

San Francisco Law Library

436 CITY HALL


No. 133353

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

v, 2472
No. 11633

ser vol. 2471
United States

Circuit Court of Appeals

For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

VS.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S BRIEF

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,

All of Butte, Montana,

Attorneys for Appellant.

FILED

AUG 14 1947



MONTANA STANDARD, PRINT

PAUL P. O'BRIEN,

CLERK

SUBJECT MATTER INDEX

	Page
STATEMENT OF JURISDICTION	1
STATEMENT OF CASE	1
Issues and Result	1
Stipulated Facts	3
Undisputed Testimony	4
Undisputed Documentary Evidence	4
Evidence as to Who Operated the Emma Mine	6
SPECIFICATIONS OF ERROR	13
ARGUMENT	19

TABLE OF CASES

Alabama Clay Products Co. v. Black, 110 So. 151.....	26
W. E. Belcher Lumber Co. v. Woodstock Land & Mineral Co., Ala., 15 So. (2d) 625	31
Campbell v. Louisville Coal Co., 89 Pac. 767	28
Commonwealth v. Panhandle Min. Co., Pa., 172 Atl. 106	29
Greek Catholic Congregation of Borough of Oly- phant v. Plummer et al., Pa., 12 Atl. (2d) 435.....	33
Hill v. Pardee, 143 Pa. 98, 22 Atl. 815	27
Jackson Hill Coal & Coke Co. v. Bales, 108 N. E. 962	27
Kansas City Northwestern Railroad Company v. Charles Schwake, Kan., 68 L.R.A. 673	25
Nisbet v. Lofton, Ky., 277 S. W. 828	28
O'Leary v. Herbert et al., Cal., 55 Pac. (2d) 835.....	30
Republic Iron & Steel Co. v. Barter, 118 So. 749.....	25
Smith v. Belshaw et al., Cal., 26 Pac. 834	28

TABLE OF TEXTS AND STATUTES

36 American Jurisprudence, Sec. 185	25
40 Corpus Juris 1197	24
Rev. Codes of Mont. of 1935, Sec. 8050	23
Rev. Codes of Mont. of 1935, Sec. 8052	23
28 U. S. C., Sec. 225 (Jud. Code Sec. 128, as amended)	1

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

This is a civil action at law brought by Mrs. Nellie Allen Poague, appellee, who was the plaintiff below, against Butte Copper and Zinc Company, a Maine corporation, appellant, who was the defendant below, for damage to land, including a residence and garage situated thereon, because of alleged breach of duty to furnish subjacent and lateral support in conducting underground mining operations. The complaint alleges diversity of citizenship (R. 2-3). This appeal is from a final money judgment (R. 12-13). Such constitutes a final decision, of which review is allowable under the applicable statute (28 U. S. C., Sec. 225, being Judicial Code Sec. 128, as amended).

STATEMENT OF CASE

Issues and Result

In plaintiff's amended complaint it is alleged that

at all times since December 8th, 1910, she was the owner of Lot 4 and the north 10 feet of Lot 5, Block 67 of the Original Townsite of Butte, Montana, including a 1-story brick veneer dwelling, together with a 2-story brick building thereon, all of the value, but for the acts of defendant, of Seven Thousand Five Hundred Dollars (\$7,500.00) (R. 3) and of no greater value because of said acts than Five Hundred Dollars (\$500.00) (R. 5).

It is also therein alleged that for a continuous period since July 19th, 1917, defendant, by itself and through its agent, servant or partner, Anaconda Copper Mining Company, by underground mining unlawfully destroyed and impaired the subjacent and lateral support of plaintiff's said property.

It is further therein alleged that at all times since said July 19th, 1917, defendant, by certain partnership agreement, working contract or lease with Anaconda Copper Mining Company, worked and operated certain quartz lode mining claims; and that the contract contained no provision for protection of plaintiff's property by said Anaconda, and that such work of said Anaconda, lessee, and defendant caused the injuries alleged to plaintiff's property (R. 5).

In addition, allegations are made therein that no part of the sum of Seven Thousand Dollars (\$7,000.00) has been paid, and that defendant has damaged plaintiff in such sum by reason of some or all of the acts alleged.

It is asked in the amended complaint that said loss and damage having completely occurred, interest be given from the date of filing complaint until paid,

and the prayer is for judgment for Seven Thousand Dollars (\$7,000.00) with interest and costs (R. 6).

Defendant's answer, as far as material here, was a denial (R. 7-10).

A jury trial having been demanded (R. 9), the case was tried to a jury (R. 25). After both sides rested (R. 328), defendant moved the court for an order directing a verdict in its favor upon the following grounds:

"1. That there is no evidence to support a verdict in favor of plaintiff and against the defendant.

"2. That there is no evidence to support a judgment in favor of plaintiff and against defendant.

"3. That there is no evidence that defendant by itself or by or through any agent, servant or partner has done underground mining which caused any damage complained of, and that there is no evidence that defendant as lessor is liable for or did or caused any damage complained of." (R. 329).

This motion the court denied (R. 11, 329). Thereafter, following arguments of counsel and instructions by the court (R. 341-356), the jury retired and subsequently returned its verdict for plaintiff for Five Thousand Five Hundred Dollars (\$5,500.00) with interest at Six Percent (6%) per annum from February 2nd, 1946 (R. 11, 370). Following the entry of judgment upon the verdict, defendant appealed (R. 12-14).

Stipulated Facts

Since December 13th, 1910, appellee owned the land and buildings in question "***excepting and reserv-

ing, however, all of the ores and minerals beneath the surface of the above described premises, with the right to mine for, and extract the same***.” (R. 27-28).

The appellant, since 1917, has owned the minerals (R. 158).

Undisputed Testimony

That the evidence showed that appellee’s property was damaged is conceded by appellant. Likewise, it is true, and appellant therefore concedes, that the evidence shows that damage to such property was caused by underground mining in the Emma.

With reference to the time when the damage complained of first appeared, while most of such damage occurred within two or three years prior to the trial, it was shown that some damage appeared about six years prior to trial (R. 45), or in 1941 in that the trial was had during the months of March and April, 1947 (R. 25).

Undisputed Documentary Evidence

Plaintiff’s Exhibit 8-A, received in evidence over appellant’s objections (R. 164), is an agreement concerning the mining property herein involved, dated July 6th, 1917, wherein appellant “***leases and demises***” such property unto Anaconda Copper Mining Company, referred to in the agreement as the “Mining Company” (R. 371, 372), for the period from the last mentioned date until and including July 8th, 1931 (R. 373). The consideration therefor inuring to the appellant was, as stated therein, Fifty Per-

cent (50%) of the net returns from all ores and minerals mined thereunder (R. 375).

Among other things and as far as material here, said lease contained the following provisions:

“* * * It is agreed that the said Mining Company shall have the right, during the said leased term, to work all of the said premises above described and referred to, in mine fashion, and to extract and remove therefrom all ores and minerals which may be encountered, and which, in the Mining Company’s opinion, may be desirable or profitable to extract and remove.” (R. 373).

“The said Mining Company agrees that it will, during the said leased term, continue in possession of said leased premises and the mine workings therein contained, and that it will install and provide such suitable equipment and machinery as may be necessary in order to operate the same.” (R. 373).

“* * * All work done by the Mining Company on said property shall be done in a good, workmanlike, minerlike and substantial manner.” (R. 373).

“* * * It is understood and agreed that the management of the property hereby leased, and the conduct of all mining operations thereon, shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; * * *.” (R. 376).

Plaintiff’s Exhibit 9, received in evidence over appellant’s objections (R. 166), dated October 17th, 1927, an agreement between appellant and Anaconda, extends the term of the aforesaid lease until and including July 8th, 1936 (R. 384).

Plaintiff’s Exhibit 10, received in evidence over appellant’s objections (R. 167), dated June 1st, 1933, an agreement between appellant and Anaconda, extends

the term of the aforesaid lease until and including July 8th, 1941 (R. 390).

Plaintiff's Exhibit 11, received in evidence over appellant's objections (R. 167-168), dated June 24th, 1940, an agreement between appellant and Anaconda, "****leases, lets and demises****" the property leased under the aforesaid lease dated July 6th, 1917, and other property (R. 396-403) for Fifty Percent (50%) of the net returns from all ores and minerals mined thereunder (R. 405-406) from the date of June 24th, 1940, until and including June 24th, 1950, and cancels said lease dated July 6th, 1917 (R. 403). Said agreement of June 24th, 1940, contains provisions substantially identical with the provisions contained in the lease of July 6th, 1917, hereinbefore specifically set forth (R. 404, 406-407).

Evidence as to Who Operated the Emma Mine

Aside from the leasing agreements hereinbefore mentioned, the only evidence tending to connect Butte Copper and Zinc Company in any way with the mining operations in question is the following testimony given by appellee's engineer, Edgar J. Strassberger:

"Q. Now, were you given permission by the persons operating that shaft to go down and inspect the workings under the Ella Poague property?

"A. I was.

"Q. How often have you had that permission?

"A. Ever since 1944 at times that I desired to go down.

“Q. What Company gave you that permission?

“A. I believe it was the A. C. M. Company.

“Q. Anaconda Copper Mining Company?

“A. That’s right.

“Q. And when you wished to go down who would you ask for permission?

“A. I think Mr. Genzberger got me the original arrangements, or you; and I would contact either Mr. O’Kelly’s office or Mr. Strandberg.

“Q. Who was Mr. O’Kelly as to the Anaconda Copper Mining Company?

“A. I believe he is the Chief Engineer.

“Q. Does he function as Chief Engineer?

“A. I believe he does; yes, sir.

* * * * *

“Q. Has somebody been deputed by the Anaconda Copper Mining Company to go with you on your visits underground?

“A. Yes, sir; Fred Strandberg.

* * * * *

“Q. He is also Assistant to Mr. O’Kelly?

“A. I believe he is an Assistant to Mr. O’Kelly.

“Q. Whose machinery did you go down on?

“A. On the cage operated by the Emma mine.

* * * * *

“Q. Who operates the cage; I mean the Company?

“A. The Butte Copper and Zinc and Anaconda Copper Mining Company.

“Q. Were you furnished maps by the two Companies here as to the underground workings of the Emma mine with reference to the cross-section going under the Ella Poague property?

“A. No, I was furnished plan maps of the sills

and stopes from which I built up cross-section maps.

* * * * *

“Q. * * * I show you 19. What is 19?

“A. 19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit.

* * * * *

“Q. And is it built up and composed by you from data, plans and maps furnished you by a Company at the request of the plaintiff’s attorneys, Mr. Genzberger and myself?

“A. Yes, sir.” (tr. pp. 187-189.)

Any inference from the hereinbefore quoted testimony that appellant had any connection with the maps furnished Strassberger was dispelled by his later explanation upon direct examination by his own counsel:

“Q. You wish to explain something about ‘A’ and ‘B’ of 20?

“A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A. C. M. Company. Well, I don’t know exactly who printed the maps but they were delivered to me either personally by Mr. O’Kelly or Mr. Strandberg, or the attorney for the plaintiff.” (tr. pp. 195-196.)

Further, any such inference, as well as any inference that appellant operated the cage at the mine, was dispelled by Strassberger’s answers to questions propounded upon cross-examination, as follows:

“Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butte Copper and Zinc Company. Is that true?

"A. I figured that was true when I testified.

"Q. What caused you to figure it?

"A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.

"Q. Under lease from the Butte Copper and Zinc Co.?

"A. That's my understanding.

"Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?

"A. No, that's outside of my jurisdiction.

"Q. Why did you say you were lowered on a cage that was operated by the Butte Copper & Zinc?

"A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.

"Q. Then you don't know who operated the cage that lowered you?

"A. No, certainly not; no, I don't.

"Q. Did you testify this morning, Mr. Strassberger, that you were furnished maps, plan maps of sills and stopes by the two companies?

"A. Yes, I did and I tried to correct that. I explained that the maps were made by either one or both companies, I don't know who; but they were furnished me by Mr. O'Kelly, some by Mr. Strandberg, and some of the other maps were delivered to Mr. Genzberger and he delivered them to me and I presume they were made by either or both of those two companies.

"Q. What caused you to presume they may have been made by the Butte Copper & Zinc?

"A. Well, only that it seems to be common

knowledge that's the Butte Copper & Zinc and being operated by the Anaconda Copper Mining Company.

"Q. And from that you concluded the Butte Copper & Zinc prepared the maps?

"A. I concluded that either one did it. I don't know which did it. I wasn't present when the maps were made.

"Q. You know the employer of Mr. William O'Kelly, don't you?

"A. The Anaconda Copper Mining Company.

"Q. You know the capacity he is employed by that Company?

"A. I think Chief Engineer.

"Q. You know the employer of Mr. Strandberg?

"A. The same company.

"Q. In what capacity?

"A. I believe he is principal assistant to Mr. O'Kelly although I don't know; I assume that.

"Q. You certainly don't have any knowledge or information or ground to suspect they are employed by the Butte Copper & Zinc?

"A. I don't know, Mr. Finlen." (tr. pp. 220-222.)

That William A. O'Kelly was the Chief Engineer of Anaconda Copper Mining Company at the time of the trial and had held such position since 1935 appears from the testimony of William A. O'Kelly himself (R. 285, 286). Incidentally, O'Kelly, in answer to the inquiry as to what company had been working the Emma mine since 1917, replied, "The Anaconda Copper Mining Company." (R. 287.)

Aside from the leases hereinbefore mentioned and

from the testimony hereinbefore quoted, the only evidence connecting any person or entity, other than the Anaconda Copper Mining Company and its agents, in any way whatsoever with the mining operations in question, or with knowledge of such operations, was O'Kelly's testimony, as follows:

"Q. Mr. O'Kelly, has the Butte Copper and Zinc Company maintained a resident engineer here during the years the Anaconda Company has been working the mine?

"A. I am not sure of that.

"Q. Do you know Mr. Sam Barker?

"A. Yes, I do.

"Q. Is he in the employ of the Butte Copper and Zinc?

"A. Not to my knowledge.

"Q. What, in the way of progress reports, are opened to the Butte Copper and Zinc Company, and the progress maps of the Emma mine?

"A. While I have not received any instructions except in the case of Mr. Barker, occasionally he has access to the maps.

"Q. And whenever he asks access to the maps it is given?

"A. Yes.

"Q. How long has that course been followed?

"A. Well, so far as I know, since the Anaconda Company started mining the Emma mine.

"Q. And has he access to the mine on request?

"A. I think he has.

"Q. Whenever he requests to go underground, if it was during reasonable hours, it would be permitted?

"A. I think so.

"Q. And to any part of the mine?

“A. I think so.

* * * * *

“Q. Do you know whether or not, as a matter of fact, he has been in the Emma mine?

“A. I have not been with him in the Emma mine but I heard he has gone into the Emma mine.

“Q. Of your own knowledge, you have never been with him and never have seen him down there, is that true?

“A. No, I think I have never seen him in the mine.

“Q. Do you know what periods that he did go into the mine?

“A. No.

“Q. Whether it was a year ago or ten years ago?

“A. No. I know that he has been in the office and has examined the records over a long period and that is all I know personally of his connection with the Butte Copper and Zinc.

“Q. What do you mean by ‘records’?

“A. The stope maps, such as we have furnished.

“Q. The same maps we have furnished here?

“A. That is right.

“Q. Has he ever given any orders or direction in the operation of that mine?

“A. Not that I know of.

* * * * *

“Q. How often does he come—you said frequently—how often has he come to see the records?

“A. I would say maybe four or five times a year.

“Q. And for how many years?

“A. Well, since, to my knowledge, since 1931.”
(tr. pp. 311-312.)

Who Sam Barker was or is does not appear from the record, and the only evidence appearing in the record concerning whether he was a servant or agent of appellant is O’Kelly’s negative response to the question, “Is he in the employ of the Butte Copper and Zinc?” O’Kelly replied: “Not to my knowledge.” (R. 311.)

SPECIFICATIONS OF ERROR

Appellant hereby specifies error as follows:

I.

The court committed error in refusing to grant defendant-appellant’s motion for a directed verdict (tr. p. 329, erroneously referred to in Statement of Points on Appeal as p. 323).

II.

That the court committed error in giving plaintiff-appellee’s Instruction numbered 2 (tr. pp. 330, 366, erroneously referred to in Statement of Points on Appeal as pp. 327-328; 355).

That portion of the instruction material here charged the jury that if the mining of the defendant underneath the surface of any of the mining claims involved herein disturbed the surface of plaintiff’s land and injured the buildings thereon, then the defendant was liable for all the damage to said property proximately caused thereby (R. 366). The defendant objected to the giving of such instruction for the reason that it made the defendant liable without

any proof that defendant did or supervised any mining act or thing, either by itself or through an agent, which resulted in damage to plaintiff's property (R. 330).

III.

That the court committed error in giving plaintiff-appellee's Instruction numbered 3 (tr. pp. 330-331, 367, erroneously referred to in Statement of Points on Appeal as pp. 327-328; 355-356).

That portion of the instruction material here charged the jury that the plaintiff was entitled under the facts in the case not only to subsurface but to lateral support, and that if the jury found from the evidence that the defendant, by mining down the slope of the vein or veins or by making excavations in the earth in the immediate vicinity of plaintiff's buildings, had disturbed the plaintiff's surface or had, by mining easterly, westerly, northerly or southerly from the side planes underlying plaintiff's property, disturbed either the lateral or the subjacent support of the plaintiff's buildings, then defendant was liable to plaintiff for such disturbance because the law requires defendant to so conduct its mining operations that the surface is at all times sustained (R. 367). The defendant objected to the giving of such instruction for the reason that it permitted the jury to find from the evidence that defendant did actual mining on the premises in question, the evidence being entirely to the effect that defendant did no mining and that all of the mining was done by Anaconda Copper Mining Company (R. 330-331).

IV.

That the court committed error in giving plaintiff-appellee's Instruction numbered 5 (tr. pp. 331, 369, erroneously referred to in Statement of Points on Appeal as pp. 325, 356). The instruction charged the jury that the evidence of damage to other property in the vicinity of plaintiff's, as described in the amended complaint, did not of itself prove damages to plaintiff's property, but if the jury found such damage to have occurred due to mining operations on the part of defendant and that such damages to other property as a direct consequence affected the fair market value of plaintiff's property, then the fact of such damage to adjoining property might be by the jury taken into consideration in fixing the fair market value of plaintiff's property and the amount of damages, if any, to the plaintiff (R. 369). The defendant objected to the giving of such instruction for the reason that it instructed on matters not in issue in the case, there being no evidence of damage to neighboring property which affected the value or interest of plaintiff and the value of plaintiff's property, and for the further reason that the instruction assumed that defendant did actually conduct mining when the evidence was all to the effect that defendant did no mining (R. 331).

V.

That the court committed error in giving plaintiff-appellee's Instruction numbered 9 (tr. pp. 331-332, 368-369, erroneously referred to in Statement of Points on Appeal as pp. 325, 361-363). The instruc-

tion charged the jury with regard to damages if it found for the plaintiff (R. 368, 369). The defendant objected to the giving of such instruction for the reason that the evidence conclusively showed that no act of the defendant caused any damage to the property of plaintiff, that the mining was done under a lease, the rule being that the person operating the lease was liable for surface damage caused by its mining operations, there being no evidence herein to connect defendant in any way with the management or operation of the lease (R. 331, 332).

VI.

That the court committed error in giving plaintiff-appellee's Instruction numbered 11 (tr. pp. 332, 370, erroneously referred to in Statement of Points on Appeal as pp. 326, 364). The instruction charged the jury with reference to interest if it found for plaintiff (R. 370). The defendant objected to the giving of such instruction for the reason, among others, that it assumed that the jury might find against the defendant for acts which were not performed by it (R. 332).

VII.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 1 (tr. pp. 333-334, 362, erroneously referred to in Statement of Points on Appeal as pp. 327-355). The instruction charged the jury that the lessor-defendant was not liable for damages to the plaintiff's property due to the mining operations of the lessee (R. 362). The defendant excepted to the court's refusal to give such

instruction for the reason that the evidence failed to show that the defendant was liable for any damages to plaintiff's property, the evidence being conclusively to the effect that the damages were caused by mining conducted by a lessee and that no direct supervision of the mining was exercised by defendant and no knowledge of the condition existing resulting from the mining was had by the defendant (R. 333, 334).

VIII.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 12 (tr. pp. 335, 364, erroneously referred to in Statement of Points on Appeal as pp. 328-329, 357). The instruction charged the jury to return its verdict in favor of defendant (R. 364). The defendant excepted to the court's refusal to give such instruction for the reason that there was no evidence in the case showing any responsibility of defendant for the damages alleged sustained by plaintiff (R. 335).

IX.

That the court committed error in refusing to give defendant-appellant's Instruction numbered 13 (tr. pp. 335, 364, erroneously referred to in Statement of Points on Appeal as pp. 329, 357). The instruction charged the jury that there was no evidence in the case that the mining operations alleged to have damaged plaintiff's property were carried on by defendant either by itself or through a servant, agent or partner (R. 364). The defendant excepted to the court's refusal to give such instruction for the reason that the evidence conclusively showed defendant did

not conduct any mining operations either by itself or through an agent (R. 335).

X.

That the court committed error in giving that portion of its charge to the jury set forth as follows:

“If you find from a preponderance of the evidence that continuously since on or about 1917 to April 1, 1946, the time of the filing of the amended complaint herein, the Anaconda Copper Mining Company, a corporation, has been engaged in mining within the Emma, Czarromah and the Nellie quartz lode mining claims, the property of the defendant in this action, with the knowledge and consent of the defendant Butte Copper and Zinc Company, a corporation, as its lessee; and in the course of the mining operations so carried on by the Anaconda Copper Mining Company, a corporation, in the said mining claims, it so disturbed or withdrew from the surface of the property of the plaintiff the subjacent and lateral support of the surface and that as a direct and proximate result thereof, the surface and property of the plaintiff subsided and caused injury and damage to the structures and the property of said plaintiff, then the Butte Copper and Zinc Company, a corporation, is liable for all the damage you find from the evidence the plaintiff sustained by reason of such mining operations.” (tr. pp. 338-339, 349, erroneously referred to in Statement of Points on Appeal as pp. 331-333, 342-343).

The defendant objected to the giving of such instruction for the reason that it assumed to make the lessor liable for the actions of the lessee, and for the further reason that there was no evidence of consent on the part of the lessor to the damages, if any, resulting from mining (R. 339).

XI.

That the court committed error in refusing to give defendant-appellant's requested Instruction numbered 16 (tr. pp. 336-337, 365, erroneously referred to in Statement of Points on Appeal as pp. 330-331, 358). The instruction charged the jury that the absence of specific provision in the lease between defendant and Anaconda Copper Mining Company to the effect that the lessee maintained the surface of the demised ground had no bearing on the issues in the case and must, therefore, be disregarded (R. 365). The defendant excepted to the court's refusal to give such instruction for the reason that the law is to the effect that a lessor is not obligated to place restriction in an ordinary lease, and for the further reason that there was no duty upon the lessor, defendant herein, to place any restrictions in its lease to Anaconda Copper Mining Company, it being agreed that the lease shows that Anaconda Copper Mining Company was required to conduct mining operations in a workman-like manner (R. 336, 337).

ARGUMENT

In appellant's Statement of Points on Appeal, heretofore filed herein (R. 417-425), paragraphs numbered 11, 12, 13, 14 and 15, respectively, concern evidence admitted over defendant's objections, which the trial court subsequently refused to strike upon defendant's motion, relating to leaks, repairs and changes in gas mains and pipes and to gas explosions occurring in numerous places in the City of Butte, Montana; and the trial court's refusal to strike or to instruct

the jury, as requested by appellant, regarding testimony by plaintiff concerning plumbing leaks on and near her property; and concerning the trial court's refusal to instruct the jury, as requested by appellant, regarding evidence of razing the buildings upon plaintiff's property.

While appellant believes that the trial court's action in each of the foregoing particulars was improper in that no cause for which appellant was responsible was shown regarding such evidence, and in that no necessity for the razing of said buildings was shown, no argument will be made herein in support thereof because, as will hereinafter be shown, it is respectfully submitted that for another reason the judgment of the trial court should be reversed and the action dismissed.

Each of appellant's Specifications of Error numbered from and including 1 to and including 10 presents the legal question as to whether or not there is evidence upon which to predicate the conclusion that appellant, a Maine corporation, was liable for the mining of its property in Montana, which was done by another and which caused damage to plaintiff's property. Each and all of the Specifications of Error for the purpose of this argument will be considered together as presenting this one question.

In the amended complaint it is alleged that the mining complained of was done by appellant by itself and through its agent, servant or partner, Anaconda Copper Mining Company (R. 4, 5). No evidence whatever appears which even tends to show that appellant by itself did any mining whatever. The first

impression attempted by the witness Strassberger that both appellant and Anaconda operated the cage at the mine (R. 188) would constitute no evidence that appellant itself did the underground mining which damaged appellee's property. Further, such first impression as to the operation of the cage was corrected by the same witness, Strassberger, when he testified as follows:

"Q. I believe you testified this morning, Mr. Strassberger, that you were lowered on a cage at the Emma mine operated by the Anaconda Copper Mining Company and Butte Copper and Zinc Company. Is that true?

"A. I figured that was true when I testified.

"Q. What caused you to figure it?

"A. That it was the Emma property and I understand it's being operated by the Anaconda Copper Mining Company under lease from the Butte Copper and Zinc.

"Q. Under lease from the Butte Copper and Zinc Co.?

"A. That's my understanding.

"Q. Have you any understanding the Butte Copper & Zinc Company has anything to do with the operation of the Emma mine?

"A. No, that's outside of my jurisdiction.

"Q. Why did you say you were lowered on a cage that was operated by the Butte Copper & Zinc?

"A. That's commonly known as the Butte Copper & Zinc property and so I made the statement. I believe it is the Butte Copper and Zinc. As to ownership I can't give you any ownership of the property.

"Q. Then you don't know who operated the cage that lowered you?

“A. No, certainly not; no, I don’t.” (tr. p. 220).

Likewise, the first impression left by the witness, Strassberger, in answer to the leading question of his counsel as to whether or not he had been furnished maps by the two companies with reference to the cross-section going under the Ella Poague property (R. 188) would constitute no evidence that appellant itself engaged in any mining. At the most it would merely constitute evidence that appellant and Anaconda furnished Strassberger with underground mining maps. But that appellant did not furnish any such maps is clear from Strassberger’s own testimony with reference to the exhibit prepared by him from the maps furnished by Anaconda:

“19 is a plan map built up from the sill maps as furnished me by the Anaconda Copper Mining Company. I built the exhibit.” (tr. p. 189)

as well as from his explanatory testimony as follows:

“Q. You wish to explain something about ‘A’ and ‘B’ of 20?

“A. The maps in general. I was asked who furnished the maps and I believe I stated the Butte Copper & Zinc and the A. C. M. Company. Well, I don’t know exactly who printed the maps but they were delivered to me either personally by Mr. O’Kelly or Mr. Strandberg, or the attorney for the plaintiff.” (tr. pp. 195-196.)

No evidence appears which even tends to show that appellant did the mining complained of through Anaconda Copper Mining Company as its agent, servant or partner. The evidence does show that the mining was done by Anaconda under lease (admitted over appellant’s objections. R. 164, 167, 168) from appel-

lant, pursuant to which appellant was to receive Fifty Percent (50%) of the net returns from all ores and minerals mined (R. 375).

Under Montana law a mining partnership exists “***when two or more persons who own or acquire a mining claim for the purpose of working it and extracting mineral therefrom actually engage in working the same.” (Revised Codes of Montana of 1935, Sec. 8050). Also, under Montana law “a member of a mining partnership shares in the profits and losses thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.” (Revised Codes of Montana of 1935, Sec. 8052). Appellant did not engage in working the mine, nor did it agree to share any losses from the operation. It merely leased its mining property for a percentage of the net returns. Under the terms of the lease the right to work the property was the right of Anaconda Copper Mining Company (R. 373), the right to possession was the right of Anaconda Copper Mining Company (R. 373), and it was expressly understood and agreed between the two companies that the management of the property and the conduct of all mining operations thereon was “***vested exclusively***” in Anaconda, or such person or representatives as it might designate (R. 376). The lease further provided that all work done by Anaconda be done in a good, workmanlike, miner-like and substantial manner (R. 373).

In view of the facts that appellant did no mining by itself and that appellant did no mining through an agent, servant or partner, and in view of the fact that

the mining was done by Anaconda under a lease from appellant containing the provisions hereinbefore referred to, and in view of the further fact that the record is barren of any evidence indicating any knowledge by appellant of the manner in which the mining under the lease was conducted or of the effects of such mining upon the surface of the earth, the question presented is whether or not under such circumstances the appellant is liable for the damage caused by the mining done by Anaconda. Incidentally, in this connection the Court's attention is directed to the fact that the last leasing agreement was entered into in 1940 (R. 394), which was prior to the earliest sign of damage to appellee's property (R. 45, 25).

There is neither allegation nor proof that the mining was negligently done, but even where mining done by a lessee is done in a negligent manner the general rule is as follows:

“ * * * The lessor of a mine is ordinarily not liable to the owner of the surface for damages caused by the lessee's negligence in mining and taking out coal, unless he has retained or assumed control over the operations, or, with knowledge of the facts, received a benefit therefrom.”

40 Corpus Juris, page 1197.

Other texts have the following to say:

“§ 185. *Lease as Affecting*.—A lessee of the mine, and not the lessor, is liable for subsidence of the surface caused by mining operations over which the lessee is in full control. However, a lessor is liable for subsidence caused by operations by his tenant under a mining lease which provides for excavations which will remove the surface support. The lessee of the lower strata of a mine cannot recover from the mineowner for

injuries to his premises caused by the operations of the lessee of the upper strata, unless the owner could have foreseen at the time of making the lease of the upper strata that the operation thereof would necessarily injure the premises of the lower lessee.”

36 American Jurisprudence, Sec. 185,
page 407.

“A lessee of the minerals, and not the lessor, is liable for a subsidence caused by operations of the former over which he has full control. *Dicta* in *Kistler v. Thompson*, 158 Pa. 139, 27 Atl. 874, and *Little Schuylkill Nav. R. & Coal Co. v. Tamaqua*, 1 Walk. (Pa.) 468.”

Note to *Kansas City Northwestern Railroad Company v. Charles Schwake*, Kan., 68
L.R.A. 673, 695.

The specific question as to the liability of the lessor for damage to the surface by the mining operations of the lessee has been dealt with by the courts in a number of cases. In *Republic Iron & Steel Co. v. Barter*, 118 So. 749, the Supreme Court of Alabama states, at page 751:

“It may be conceded, for the purpose in hand, that as a general rule, where the lease contemplates ordinary mining operations, the lessee and not the lessor is liable for damages resulting from subsidence. Such is the effect of a dictum in *Alabama Clay Products Co. v. Black*, 215 Ala. 170, 110 So. 151, following a like holding, also dictum, in *Kistler v. Thompson*, 158 Pa. 139, 27 A. 874; 68 L. R. A. note 695; and as was held in *Offerman v. Starr*, 2 Pa. 394, 44 Am. Dec. 211.”

The Alabama court in the case cited above decided both the lessor and the lessee were liable, because the lease expressly authorized the lessee to rob the mine

of pillars and stumps and leave the surface without subjacent support, and it was not decided under the general rule which the court expressly set forth in this case. The facts in the Barter Case are in nowise similar to the facts in the case at bar.

In *Alabama Clay Products Co. v. Black*, 110 So. 151, the court said in part, at page 152:

“Ordinarily the lessee of the minerals, and not the lessor, is liable for a subsidence of the surface caused by mining operations over which the lessee is in full control. * * *.”

The court then continues to set forth some of the exceptions to the general rule, and says, at page 152:

“* * * On the other hand, if the lessor reserves the right in the lease to direct or control the mining operations of the lessee and gives directions as to taking coal from the pillars or supports of the mine and in consequence of such directions the surface caves in, he is liable to the owner of the surface for the resulting injury. *Kistler v. Thompson*, 158 Pa. 139, 27 A. 874. Or if he assumes control over the operation, whether the right to do so was reserved in the lease or not, and injury results from his control or direction, he would be liable. In the case of *Campbell v. Louisville Coal Co.*, 39 Colo. 379, 89 P. 767, 10 L. R. A. (N. S.) 822, the Colorado court seems to hold that the lessor would be liable if he received a benefit from the mining operations, with knowledge of the facts, whether he did or did not reserve in the lease a control or direction over the mining operation, or whether or not he was exercising any control whatever over same, proceeding upon the theory that there was an implied duty upon him, which should be read into the lease, of seeing that the lessee so conducted the mining operations as not to injure the surface. As to this, we cannot subscribe, as the mere receipt of a royalty for the mineral even if he

knows of the mining operations would not authorize or require him to interfere and control simply because he may have been the owner of the mineral, in the absence of the reservation of the right to do so under the terms of the lease.”

The Supreme Court of Indiana in the case of *Jackson Hill Coal & Coke Co. v. Bales*, 108 N. E. 962, said, *inter alia*, at page 964:

“Instructions 13 and 14 contain the declaration that it is the owner of the mine and not the lessee who operates it, that is liable for injury to the surface by reason of improper or insufficient support. This was properly refused, as it is the one who takes out the coal without leaving proper support that is liable for damages to the owner of the surface, if the same subside by reason of his failure to properly support it. *Schmoe v. Cotton*, 167 Ind. 364, 368, 79 N. E. 184; *Western Indiana Coal Co. v. Brown*, 36 Ind. App. 44, 49, 74 N. E. 1027, 114 Am. St. Rep. 367; *Yandes v. Wright*, 66 Ind. 319, 325, 32 Am. Rep. 109; 18 Am. and Eng. Ency. Law (2d Ed.) 556, and cases cited; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242, 244; 27 Cyc. 788, note 49; *Paull v. Island Coal Co.*, 44 Ind. App. 218, 222, 88 N. E. 959; *Wood on Nuisance* (2d Ed.) § 192.”

In *Hill v. Pardee*, 143 Pa. 98, 22 Atl. 815, the court said that it appearing that the removal of coal without leaving sufficient support for the surface *was the act of a lessee of the right to mine the coal, prima facie the lessor of such right was not liable to the owner of the surface for the damages*; and that there could be no recovery against the lessor on his covenant to make good any damage done to the surface by the mining operations conducted underneath it for the reason that the covenant was not declared upon as the basis of the action, and even if it had been, the

lessor and lessee could not have been properly joined since the lessee was not a party to the covenant.

The Supreme Court of Colorado, in the case of *Campbell v. Louisville Coal Co.*, 89 Pac. 767, stated, at page 769:

“ * * * The case does not fall within the general rule to the effect that the lessor of premises is not liable for the negligence of his lessee, because, ordinarily, the lessor does not retain, and is under no obligation to retain, control over the demised premises. * * * .”

In the Colorado case cited *supra* the court decided the lessor was liable for injury to the surface owner's property because the lessor had *actual knowledge* that the lessee removed all of the coal, leaving no supports whatsoever, and the lessor consented to and sanctioned these negligent acts of the lessee. See, also, *Nisbet v. Lofton*, Ky., 277 S. W. 828, in which case the court held the owner liable because he had actual knowledge and consented to the negligence of another in removing coal without leaving supports for the surface. The party doing the actual mining had no lease and the owner could have stopped the mining at any time after the surface owner made complaint.

In the following cases the courts have stated:

“ * * * The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work, and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, that the citation of authorities is unnecessary labor. * * * .”

Smith v. Belshaw et al., Cal., 26 Pac. 834.

“ ‘It is the contention of the defendant that the

law of *Noonan v. Pardee* controls the instant case. With this contention, the court in banc is in accord, and it is of the opinion that the commonwealth cannot recover damages from an abutting subsequent property owner for the subsidence of a highway caused by a former owner of the mineral estate. Before the commonwealth could recover in a case of this kind, it must aver and prove that the owner whose premises abutted on the highway has actually mined the coal that caused the damage complained of, and that such mining was the proximate cause of the subsidence of the surface. An examination of the cases cited in this opinion, shows that where recovery has been permitted, it is against a defendant who mined the coal.' ”

Commonwealth v. Panhandle Min. Co., Pa.,
172 Atl. 106, 107.

“It is well established in this state, as in other jurisdictions, that a landlord is not liable for acts of negligence of tenants. Among the leading cases are *Kalis v. Shattuck*, 69 Cal. 593, 11 P. 346, 58 Am. Rep. 568, and *Higgins v. Los Angeles Gas & Elec. Co.*, 159 Cal. 651, 115 P. 313, 34 L. R. A. (N. S.) 717. In the first of these cases it was held (69 Cal. 593, at page 597, 11 P. 346, 58 Am. Rep. 568) that a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury. As stated by the Supreme Court of Massachusetts: ‘A landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose.’ *Saltonstall v. Banker*, 8 Gray, 195; *Peck v. Peterson*, 15 Cal. App. 543, 115 P. 327. The receipt by these defendants of royalty for the minerals, under the circumstances found,

would not authorize or require them to interfere with or control the mining operations carried on by their lessee. *Alabama Clay Products Co. v. Black*, 215 Ala. 170, 110 So. 151. It is not shown or found that the defendants Hastings or Leet, as administrator, have any interest in the relief sought by the respondents. In the lease of the mining interests these appellants retained the right to enter upon and examine the property at any time and, by its terms, they required the mining company to operate the mine with due regard to the safety, development and preservation of the premises as a working mine. No damages were awarded against the absentee landlords (these appellants), nor were costs assessed against them. We must therefore conclude that the trial court was of the view that they were in no way liable in the premises. No connection has been established between these appellants and the continued flow of water through the tunnel. The restraining order against the maintenance of that condition, so far as these appellants are concerned, seems an idle act. The trial court should have granted their motion to vacate and set it aside. The judgment and order, so far as concerns these appellants, should be reversed and the appellants should have their costs on appeal. It will be so ordered."

O'Leary v. Herbert et al., Cal.,
55 Pac. (2d) 835, 836.

" * * * "Ever since *Quarman v. Burnet*, 6 Mees. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty per-

formed, by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it. *Hole v. Sittingbourne & Sheerness Railway*, 6 Hurl. & N. 488; *Pickard v. Smith*, 10 C. B., N. S., 470, 473; *Tarry v. Ashton*, 1 Q. B. Div. 314.' See *Hughes v. Percival*, 8 App. Cas. 443; *Bower v. Peate*, 1 Q. B. D. 321; *Woodman v. Metropolitan Railroad*, 149 Mass. 335, 21 N. E. 482; 4 L. R. A. 213, 14 Am. St. Rep. 427; *Blessington v. Boston*, 153 Mass. 409, 26 N. E. 1113; *Harding v. Boston*, 163 Mass. 14, 39 N. E. 411.' *Cabot v. Kingman*, 166 Mass. 406, 44 N. E. 345, 33 L. R. A. 45.

"This doctrine was reaffirmed by this court in *Republic Iron & Steel Co. v. Barter*, 218 Ala. 369, 118 So. 749, and applied to a lessor who authorized the removal by the lessee of the pillars left in the original operation, in consequence of which there was a subsidence, to the damage of the owner. See also *Campbell v. Louisville Coal Mining Co.*, 39 Colo. 379, 89 P. 767, 10 L. R. A., N. S., 822; *Alabama Clay Products Co. v. Black*, 215 Ala. 170, 110 So. 151."

W. E. Belcher Lumber Co. v. Woodstock Land & Mineral Co., Ala., 15 So. (2d) 625, 628.

"It is settled law in this Commonwealth that the Lessor of a coal mine is not responsible in trespass for the negligent mining by his lessee which results in damage to the surface. In *Hill v. Pardee*, 143 Pa. 98, 22 A. 815, this court held that in such a case the disturbance of a right of surface support is a tort for which the party which did the mining and not the Lessor was responsible. In *Offerman v. Starr*, 2 Pa. 394, 44 Am. Dec. 211, this court said in an opinion by Chief Justice Gibson: 'Respondeat superior is inapplicable to an owner of land, for acts of negligence in a business not conducted by him and for

his account. What had these defendants to do with the direction of the business or the coal when it was mined? Lewis covenanted to sink the slope, erect the engine, to take out a certain number of tons each year, according to the most approved method of mining, and carry it to the landing; and to pay a certain sum per ton for it. So far the defendants had nothing to do with the business, but to receive their rent. But they reserved a right to visit and examine the manner in which the business should be carried on in the mine; and to resume the possession should the tenant refuse to furnish statements of the amount taken out, or pay the rent. These clauses do not constitute a reservation of the possession or a right to interfere with the direction of the business. The right of visit was to enable them to see whether the tenant was performing his engagements, in order to found process against him if he were breaking them; and the right to resume the possession was to put an end to the business altogether. The lease was analogous in all respects to the lease of a farm with a clause of re-entry for bad farming, or non-payment of rent. On no principle, then, could the acts of Lewis be imputed to his lessors.'

" * * * Mere collection of 'rents and royalties' as a part of the purchase price does not constitute a participation in the mining.

* * * * *

"Appellant also contends that because the defendants sent a mining engineer into the mine from time to time to inspect and report to the lessor on the mining operations, they 'aided and abetted and participated in the mining and digging out of the said coal as fully and effectually as they individually could have done had they been present in person.' In making this contention, the appellant is asking this court to attribute to a well recognized custom in respect to mining 'leased' coal a legal significance the custom does

not have. Lessors of coal, whose remuneration depends on the tonnage mined, are properly vigilant in seeing to it that none of the coal is wasted by reckless, unskilful mining and to this end they customarily reserve the right to inspect the workings either by themselves or by a competent mining engineer. That such a provision does not make the lessor a 'director' of the mining operation was expressly held by this court in *Offerman v. Starr*, 2 Pa. 394, 44 Am. Dec. 211, *supra*. In *Miles v. Pennsylvania Coal Co.*, 217 Pa. 449, 66 A. 764, 10 Ann. Cas. 871, this court held that a provision giving the lessor the right to enter the workings for inspection of the mining 'does not change the character of the instrument,' i. e., the coal lease."

Greek Catholic Congregation of Borough
of Olyphant v. Plummer et al.,
Pa., 12 Atl. (2d) 435, 437, 438, 440.

In view of the foregoing authorities, we contend that in that the mining herein involved was done under lease by another with no control exercisable or exercised by the appellant, and with no showing that appellant had knowledge of the actual mining done and consented thereto, the judgment upon the verdict cannot stand and must be reversed. To hold to the contrary would make a mere lessor liable for the acts of others, which acts it did not direct and which acts it had no right to direct or knowledge concerning.

Respectfully submitted,

W. H. Hoover, R. H. Glover,
John V. Dwyer, J. F. Dinkley, Jr.,
Sam Stephenson, Jr.,

Attorneys for Appellant,
Butte Copper & Zinc Company,
a corporation.

Service of the foregoing Brief of Appellant acknowledged and ~~Three~~ copies thereof received this
.....18th..... day of August, 1947.

W. L. Murray

Al G. Stone

Charles H. Gensberger

Attorneys for Respondent.

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation, Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,
Appellee.

—
BRIEF OF APPELLEE
—

FILED

SEP 12 1947

H. L. MAURY, PAUL P. O'BRIEN,
AL. G. SHONE, CLERK
EARLE N. GENZBERGER,
Attorneys for Appellee.

No. 11633

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation, Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,
Appellee.

BRIEF OF APPELLEE

H .L. MAURY,
AL. G. SHONE,
EARLE N. GENZBERGER,
Attorneys for Appellee.

ii.

INDEX

	Page
Statement of the Case.....	1
Appellee's Points and Authorities.....	2
Argument	3
1. Rule in Erie Railroad Company vs. Tompkins Applies	3
2. Montana Law is Determinative.....	3
Statutes	3
The General Rule.....	4
Montana Decisions	5
3. Amerman Case is Decisive Here.....	8
4. Appellant's Brief	9
Conclusion	17

CITATIONS

Ahlquist v. Mulvaney Realty Co., 116 Mont. 6, 152 Pac. (2d) 137.....	8
Belcher Lumber Co. v. Woodstock Land & Mineral Co., (Ala.) 15 So. (2d) 625, 628.....	10, 11, 16
Benton v. Kernan (N. J.) 13 Atl. (2nd) 825.....	16
Benton v. Kernan (N. J. E.) 21 Atl. (2nd) 755, 760	16
Butte Copper and Zinc Company v. Amerman, (C. C. A. 9th) 157 Fed. (2d) 457.....	2, 8, 9, 18
Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45.....	17
Campbell v. Louisville Coal Co. (Colo.), 89 Pac. 767, 768	9, 10
Catron v. South Butte Mining Co. (C. C. A. 9th), 181 Fed. 941.....	4
Erie Railroad Company v. Tompkins, 304 U. S. 64....	2, 3
Fagan v. Silver, 57 Mont. 427, 188 Pac. 900.....	5, 6
Holter Hardware Co. v. Western Mortgage Co., 51 Mont. 94, 149 Pac. 489.....	6, 7
Jones v. Weaver, 123 Fed. (2d) 403.....	3
Mitchell v. Thomas, 91 Mont. 370, 8 Pac. (2d) 639	7, 8, 11

INDEX

	Page
Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th), 75 Fed. (2d) 79.....	1
Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805, 810	4, 7
Nisbet v. Lofton, (Ky.) 277 S. W. 828.....	16
Peters v. Bellingham Coal Mines, (Wash.) 21 Pac. (2d) 1024	15, 16
Railroad Co. v. Morey, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269.....	6
Republic Iron & Steel Co. v. Barter (Ala.), 118 So. 749	16, 17
Sears-Roebuck v. Marhenke, 121 Fed. (2d) 599.....	3
Stoner v. New York Life Ins. Co., 311 U. S. 336, 61 S. Ct. 336, 85 Law Ed. 284.....	3
Western National Ins. Co. v. LeClare (C. C. A. 9th),Fed. (2d)....., dec. August 13, 1947....	1
U. S. v. Los Angeles Soap Co. (C. C. A. 9th), 83 Fed. (2d) 875	1

TEXTS

1 American Jurisprudence, Sec. 37, p. 527.....	14, 15
American Law Institute, Restatement on Torts	
Section 822, p. 226.....	14
Section 837, p. 292.....	13
2 Corpus Juris Secundum, Sec. 16, p. 17.....	15
Lindley on Mines, Vol. 3, Sec. 818-819, pp. 2010- 2014	4

STATUTES

Section 6773, R. C. Montana, 1935.....	3
Section 8743, R. C. Montana, 1935.....	4
Section 8748, R. C. Montana, 1935.....	4
Section 2, Article III, U. S. Constitution.....	3
28 U. S. C., Sec. 41 (1).....	3
28 U. S. C., Sec. 225.....	3

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation, Appellant,
vs.
MRS. NELLIE ALLEN POAGUE,
Appellee.

STATEMENT OF THE CASE.

In this case, as has been well stated by the appellant, the facts are substantially undisputed. The property of the appellee, the plaintiff below, was injured by underground mining done in ground owned by the appellant through operations conducted therein by the Anaconda Copper Mining Company under the agreement, which is set forth as Plaintiff's Exhibit 11 (R. pp. 394-414, inc.) .

The appellant has abandoned all other specifications of error, and submits this appeal upon one proposition of law. (Appellant's brief, p. 20.)

Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th),
75 Fed. (2d) 79;

U. S. v. Los Angeles Soap Co. (C. C. A. 9th),
83 Fed. (2d) 875;

Western Nat'l. Ins. Co. v. LeClare (C. C. A. 9th),
.....Fed. (2d)....., dec. Aug. 13, 1947.

The appellant (defendant below) submits this case upon the sole contention that the lessor appellant is not responsible for the acts of the Anaconda Copper Mining Company as its lessee. Appellee contends that it is unnecessary to a decision in this case to determine whether the Anaconda Copper Mining Company under the agreement, Plaintiff's Exhibit 11 and the agreements preceding it, (Exhibits 8-A R. pp. 371-382) 9 (R. pp. 382-386) and 10 (R. pp. 386-394) was a lessee, a partner, an agent or an independent contractor. The result must be the same in any case.

APPELLEE'S POINTS AND AUTHORITIES

1. The rule in the case of *Erie Railroad Company vs. Tomkins*, 304 U. S. 64, applies and the Montana Law is determinative.

2. Under the law of Montana a landowner cannot escape responsibility for a duty imposed upon him by statute or common law by delegating such duty to another.

3. The contention of the appellant was decided adversely to it by this court in the case of *Butte Copper and Zinc Company v. Amerman*, (C. C. A. 9th), 157 Fed. (2d) 457.

4. The cases cited by appellant do not sustain its contention, and the general rule of law is that both the landlord and tenant are jointly and severally liable under the circumstances shown by the facts in this case.

ARGUMENT

1. *Rule in Erie Railroad Company v. Tomkins Applies.*

As pointed out by appellant, this case comes to this court by reason of diversity of citizenship between the plaintiff below and the defendant, a Maine corporation, and the jurisdiction of the Court is therefore derived from Section 2 of Article III, of the United States Constitution and the Statutes 28 U. S. C. 41 (1); 28 U. S. C. 225, enacted pursuant thereto.

“Except in matters governed by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the State.”

Erie Railroad Co. v. Tompkins, 304 U. S., 64, at p. 78, 82 Law Ed. 1188; 58 S. Ct. 817.

Stoner v. New York Life Ins. Co., 311 U. S. 336, 61 S. Ct. 336, 85 Law Ed. 284.

Sears-Roebuck v. Marhenke, 121 F. (2nd) 599.

Jones v. Weaver, 123 Fed. (2nd) 403.

therefore:

2. MONTANA LAW IS DETERMINATIVE

STATUTES

The applicable statute in Montana is Section 6773, R. C. M., 1935, reading as follows:

“Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and

giving previous reasonable notice to the other of his intention to make such excavations."

Sec. 6773, R. C. M., 1935.

but this Court has previously held that that statute is a mere expression of the common law.

"And it is well settled that a grant of the surface, with a reservation of the minerals, and the right to extract the same, does not permit the destruction of the surface, unless the right do to so has been expressed in terms so plain as to admit of no doubt."

Catron v. South Butte Mng. Co., (CCA 9th) 181 Fed. 941.

See also *Neyman v. Pincus*, 82 Mont. 467, 487; 267 Pac. 805, at p. 810.

"8743. One must so use his own right as not to infringe upon the rights of another."

Sec. 8743, R. C. M., 1935.

"8748. He who can and does not forbid that which is done on his behalf is deemed to have bidden it."

Sec. 8748, R. C. M., 1935.

THE GENERAL RULE.

Lindley lays down the rule:

"The right of surface support is absolute unless expressly waived. On every grant of minerals there is an implied reservation of surface support. The question of negligence is not involved."

Lindley on Mines, Vol. 3, Sec. 818-819, pp. 2010-2014).

Catron v. South Butte Mining Co., CCA, 9th, 181 Fed. 941,

and cases hereinafter cited.

MONTANA DECISIONS.

Appellant concedes this rule of law, but contends that where the injury is done by a lessee that the lessor is not liable. This is not the law as construed by the Supreme Court of Montana.

The leading case in this state upon that subject is that of *Fagan v. Silver*, 57 *Montana* 427, 188 *Pac.* 900, in which an action was brought by an adjoining landowner against the owner of a quarry and his lessee to enjoin the operations of a stone quarry and rock crusher in a residential portion of the City of Butte. The injunction issued against the owner and his lessee. The Supreme Court of Montana said:

“If we consider the facts as applying to the relation of landlord and tenant, appellant cannot escape liability, for the following rules would apply: ‘One who erects a nuisance on his premises cannot escape liability by leasing the same, and his liability extends to the continuance of the nuisance after the lease goes into effect.’ (29 *Cyc.* 1202; *Anderson v. Dickie*, 26 *How. Pr. (N. Y.)* 105; *Robinson v. Smith*, 53 *Hun.* 638, 7 *N. Y. Supp.* 38; *McCarrier v. Hollister*, 15 *S. D.* 366, 91 *Am. St. Rep.* 695, 89 *N. W.* 862.)

“‘Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise.’ (Jones on Landlord & Tenant, sec. 603.)

"On the other hand, if we take the view that Mackey was an independent contractor, it is equally true that appellant cannot escape liability. While the case of *Holter Hardware Co. v. Western Mortgage Co.*, 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489, was an action for damages, the principle involved is the same, and the rule there laid down is controlling in this case."

Fagan v. Silver, 57 Mont. 427, at pp. 430, 431, 188 Pac. 900.

In the case of *Holter Hardware Co. v. Western Mortgage Co.*, 51 Mont. 94, 149 Pac. 489, which was quoted with approval in the *Fagan case*, damages resulted from debris which an independent contractor had failed to remove from the roof of defendant's building and caused damage to the plaintiff, and the Supreme Court of Montana rejected the contention that there was no liability upon the owner because the negligence, if any, was that of an independent contractor. The Supreme Court of Montana followed the case of *Railroad Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269 that a proprietor's liability is based upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking all reasonable precautions to anticipate, obviate and prevent these probable consequences. The Supreme Court of Montana said:

"Under this rule, an employer may not divest himself of the primary duty he owes to other members of the community by contracting with others for the performance of work, the necessary or probable result of which is injury to third persons. * * * Every person 'must so use his own rights as not to infringe upon the rights of another' Rev. Codes, sec. 6182,"

(now Section 8743, R. C. M., 1935).

Holter Hardware Co v. Western Mfg. Co., 51 Mont. 94, 149 Pac. 489.

The rule again was before the Supreme Court of Montana in *Neyman v. Pincus*, 82 Mont. 467, 267 Pac. 805, and in that case the Court said:

“The general rule is that, where the relation of independent contractor exists, and due diligence has been exercised in selecting a competent contractor, and the thing contracted to be done is not in itself a nuisance, nor will necessarily result in a nuisance if precautionary measures are used, and injury result, not from the fact that the work is done, but from the wrongful and negligent manner in which it is done by the contractor or his servants, the contractee is not liable therefor. (39 C. J. 1324, and notes; 14 R. C. L. 79). *There are, however, numerous exceptions to this rule, among them that indicated by the rule itself; That an employer may not divest himself of a primary duty he owes to his neighbor by contracting for the performance of work the necessary or probable result of which will be an injury to third persons.* (A. M. Holter Hardware Co. v. Western Mfg. Co., 51 Mont. 94, L. R. A. 1915F, 835, 149 Pac. 489; Fagan Silver, 57 Mont. 427, 188 Pac. 900.”

Neyman v. Pincus, 82 Mont. 467, 484, 267 Pac. 805, at p. 810.

The Supreme Court of Montana again more recently applied this same rule in the case of *Mitchell v. Thomas*, 91 Mont. 370, 8 Pac. 2d 639, which involved the liability of the landlord for injuries due to a defect in a coal-hole cover, and the question arose as to whether or not the

landlord or the tenant, or both, were liable. The Court said:

"We fail to see how either landlord or tenant by agreement respecting repairs may excuse himself from liability to the public."

Mitchell v. Thomas, 91 Mont. 370, at p. 378, 8 Pac. 2d 639.

In the case of *Ahlquist v. Mulvaney Realty Co.*, 116 Mont. 6, 152 Pac. (2d) 137, the Supreme Court of Montana again held that a landlord could not escape his duty to the public under the defense that he had leased defective premises to a third person.

3. *Amerman Case Is Decisive Here*

The appellant here was likewise the appellant in the case of *Butte Copper & Zinc Company et al v. Amerman*, 157 F. 2d 457 (C.C.A 9th) which arose out of operations in the same mine and under the same leases and contracts between the appellant and Anaconda Copper Mining Company as are here involved. In the Record in the Amerman case the Court will find that at page 12 of the printed Record this appellant filed a Separate Answer in which it contended that "the complaint fails to state a claim against this answering defendant upon which relief can be granted." That defense was overruled by the Court below (Amerman Record, p. 24).

At the close of all of the evidence in the Amerman case, this appellant requested the Court to direct the jury to find a verdict for the defendant, Butte Copper & Zinc Company. (Amerman Record p. 940), which the Court there refused (Amerman R. p. 918). Appellant joined

with its co-defendant in appealing to this Court, and in Point 2 of the Statement of Points on Appeal (Amerman Record p. 978) assigned error of the Court below in refusing Instruction No. 2 requested by appellant, Butte Copper & Zinc Company. Based upon the identical contract here involved and the same mining operation, this Court in its decision in the Amerman case said:

“We find no merit in appellants’ contention that a verdict in their favor should have been directed.”

Butte Copper & Zinc Co. v. Amerman, supra.

4. *Appellant’s Brief.*

At page 28 of Appellant’s Brief, appellant quotes from the case of *Campbell v. Louisville Coal Co.*, (Colo.) 89 Pac. 767. An examination of that case shows that the suit was brought against the owner of the mine, which it leased to the United Coal Company. Plaintiff owned a lot upon the surface of the leased tract. The Court below directed a verdict for the defendant, holding that the lessee alone was liable. In reversing such decision, the Supreme Court of Colorado said:

“Had the defendant mined the coal in the manner the lessee did, there could be no doubt of the liability of the former; but having leased the right to mine to another, is it, under the facts of this case responsible for the negligence which resulted in damage to the plaintiffs?

“*A party may not accomplish indirectly that which the law prohibits him from doing directly. One cannot knowingly reap the benefit of a wrong, and escape the liabilities resulting from such wrong.*”

Campbell v. Louisville Coal Co. (Colo.) 89 Pac. 767, at p. 768.

The Court then discusses the reciprocal duties of the landlord and tenant as expressed in the lease holding that the obligation to support the surface is implied by law in such a lease, and further states:

“A landlord who authorizes, or knowingly permits, an act on the part of his tenant which it was his duty to prohibit, whereby a third person is injured, is responsible for such injury if the tenant would be liable. *Riley v. Simpson*, 83 Cal. 217, 23 Pac. 293, 7 L. R. A. 622.”

Campbell v. Louisville Coal Co. supra.

Upon this appeal, appellant apparently concedes that the Anaconda Copper Mining Company is liable for the damage done appellee in this case.

The court will doubtless notice that the case of *Campbell v. Louisville Coal Company, supra* was quoted with approval in the case of *Belcher Lumber Co. v. Woodstock Land & Mineral Co. (Ala.)* 15 So. (2d) 625, 628, quoted by appellant at pp. 30-31 of its Brief. We contend that the holding in that case is identical with the holding of the Montana Supreme Court in the case of *Fagan v. Silver supra* when it said:

“* * * On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching to him, of seeing that duty performed, by delegating it to a contractor. *He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it.*”

Belcher Lumber Co. v. Woodstock Land & Mineral Co. (Ala.) 15 So. (2d) 625, 628.

In a special concurring opinion by Mr. Justice Matthews, in which the majority of the Court concurred in the case of *Mitchell v. Thomas, supra*, the Montana Supreme Court voiced the same opinion as that above quoted from the *Belcher Lumber Company* case to the effect that:

“As between themselves, the landlord and tenant may, of course, contract that the latter will make the repairs necessary, but the public cannot be bound by their private contract, and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact those decisions which make the statement that it does, overlook the public duty of the owner and consider the duty of the landlord and tenant *inter sese*.”

Mitchell v. Thomas, 91 Mont. 370, at p. 389, 8 Pac. (2d) 639, at p. 645.

Indeed, in this case the appellant and its lessee recognize appellant's liability to the public by reason of the existence of the Emma Mine and its lease to the Anaconda Company, for we find that in the 10th clause of plaintiff's Exhibit 11 (R. pp. 411-412) that the written lease provides:

“* * * that the Zinc Company, its officers, representatives or agents, shall at all reasonable times have access to and egress from all of the premises of the Zinc Company in the control of the Mining Company hereunder, together with a right to make full inspection and survey of the same, and to obtain at

reasonable periods from the Mining Companies copies of working maps showing mining operations conducted in said properties.

“Except as hereinafter provided, the Mining Company assumes as between the parties hereto the responsibility for all claims which may arise in favor of any individual, firm, or corporation for any tort arising out of the operation of the leased premises during the period that such premises are in possession of the Mining Company, or any contract obligations incurred by the Mining Company while controlling said premises, and the Mining Company agrees to indemnify and keep indemnified the Zinc Company, its successors and assigns, against any and all such claims, and at its own cost and expense to defend against such claims and pay the cost of such defense, and any judgment recovered on such claims;”

In this case the facts show without question that the Emma Mine was owned and operated by the appellant prior to the first lease given the Anaconda Company in July, 1917, (Plaintiff's Exhibit 8-A, R. pp. 378-382). At several points in the testimony, reference was made to the “old workings,” and in the original lease at page 374 of the Record, the Mining Company agrees that it would on or before the 8th day of July, 1925, sink the shaft *now on the said Emma lode claim an additional vertical distance* of 800 feet below the 800 foot level, and paragraph 3 of said original lease likewise refers to previous operations and requires additional work by the Mining Company.

The other terms of the lease define the obligations of the respective companies and are sufficient to show a knowledge on the part of the defendant, and a partici-

pation on the part of the owner in, and a benefit from, all work done.

Nellie Poague is not a party to any contract relieving either the owner, or the lessee of the owner, from the legal obligation to support the surface of the Poague property.

Therefore, we submit that those decisions that relieve the landlord from liability for the "collateral negligence" of the tenant are inapplicable here, but the rule in the *Fagan* case, *supra*, and the *Campbell v. Louisville Coal Mining* case *supra*, must be applied.

Every mine of necessity is a potential hazard to the surface above the workings.

From almost every jurisdiction where the lease is of an existing mine, the lessor has been held liable along with the lessee for injuries to the land or property of an adjoining landowner.

"Sec. 837. A lessor of land is liable for an invasion of another's interest in the use and enjoyment of other land, occurring while the lessor continues as owner of the land, which is caused by an activity carried on upon the leased land while the lease continues, if the lessor would be liable under the rule stated in Sec. 822 had the activity been carried on by him, and if

(a) at the time when the lease was made, renewed or amended, the lessor consented to the carrying on of the activity, or knew that it would be carried on, and

(b) the activity, as the lessor should have known, necessarily involved or was already causing such an invasion."

Sec. 837 A L I Restatement on Torts, p. 292.

Section 822 above referred to reads:

"Sec. 822. General Rule. The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

- (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
- (b) the invasion is substantial; and
- (c) the actor's conduct is a legal cause of the invasion; and
- (d) the invasion is either
 - (i) intentional and unreasonable; or
 - (ii) unintentional and otherwise actionable under the rule governing liability for negligent, reckless or ultrahazardous conduct."

Sec. 822 of Restatement on Torts p. 226.

Sec. 37. Independent Contractors. One who causes the work to be done is not liable, ordinarily, for injuries that result from carelessness in its performance by the employees of an independent contractor to whom he has left the work without reserving to himself any control over the execution of it. *But this principle has no application where a resulting injury, instead of being collateral and following from the negligent act of the employee alone, is one that might have been anticipated as a direct or probable consequence of the performance of the work contracted for* if reasonable care were omitted in the course of its performance. In such a case, a person causing the work to be done will be liable even though the negligence is that of an employee of an independent contractor. * * * But in most of the cases the right to maintain the action is predicated either on the ground that the destruction or impairment of

the lateral support is a necessary result of the stipulated work, or that the obligation of the employer to take the appropriate precautions to prevent such destruction or impairment is non-delegable."

1 *Am. Jur.*, Sec. 37, p. 527.

"Sec. 16. Land in Natural Condition. An excavating owner is liable, irrespective of negligence, for damages caused by depriving of lateral support adjoining land in its natural state, even though an independent contractor performed the work, if the damage was a necessary consequence of the excavation, but liability may also attach to the contractor or subcontractor."

2 *C. J. S.*, Sec. 16, p. 17.

After a consideration of the authorities with reference to the primary liability in the case of *Peters v. Bellingham Coal Mines*, (Wash.), 21 Pac. (2nd) 1024, the Supreme Court of Washington said:

"The law is well settled that the right of a landowner to have subjacent support is substantially the same as his right to have lateral support; and, in the absence of some clearly expressed contractual right, given by the owner, waiving his right to lateral or subjacent support to some other person, his right to such support to his land the surface thereof is absolute, and all who disturb such support are absolutely liable, regardless of their negligence in exercising their alleged rights in adjoining property, or in the earth under the surface. This is but an application of the ancient maxim that 'one should so use his own property as not to injure the rights of another'. *Farnandis v. Great Northern R. Co.*, 41 Wash. 486, 84 P. 18, 4 L. R. A. (N. S.) 1086, 111 Am. St. Rep. 1027; *Hummel v. Peterson*, 69 Wash. 143, 124 P. 400; *Johnson v. Seattle*, 80 Wash. 527, 141 P. 1032;

Williams v. Hay, 120 Pa. 485, 14 A. 379, 6 Am. St. Rep. 719; Piedmont Coal Co. v. Kearney, 114 Md. 497, 79 A. 1013; Burt v. Rocky Mountain Fuel Co., 71 Colo. 205, 205 P. 741; Cole v. Signal Knob Coal Co., 95 W. Va., 702, 122 S. E. 268, 35 A. L. R. 1134, and notes; 18 R. C. L. 141."

Peters v. Bellingham Coal Co., (Wash.), 21 Pac. (2nd) 1024.

In numerous other cases the contention has been made by the landowner that because the mining operations were done by the lessee that there was no liability to the adjoining landowner on the part of the lessor. This contention was denied in the case of *Benton v. Kernan* (N. J.) 13 Atl. (2nd) 825. The cases are reviewed at pp. 840-841, and later on appeal, the Court said:

"The rent is based upon royalties of all stone quarried. We think the record indicates a leasing for the particular purpose for which the premises are used, and it is not a case of a general letting followed by the operation of a business wholly of the lessee's choosing. In this situation, the decree properly runs against the owners who have leased their interest, as well as against the operators of the quarry."

Benton v. Kernan (N. J. E.) 21 Atl. (2d) 755, at p. 760.

See also the case of *Nisbet v. Lofton*, (Ky.) 277 S. W. 828, and the case of *Belcher Lumber Co. v. Woodstock Land & Mineral Co.* (Ala.) 15 So. (2d) 625.

The appellant likewise relies upon the case of *Republic Iron & Steel Co. v. Barter*, (Ala.) 118 So. 749, in which case there was a provision in the lease similar to that provision contained herein in the Record at page 412, and in referring to a subsidence of the surface and the duty of

the landowner as against the lessees, the Supreme Court of Alabama said:

"It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate."

The Court quotes the rule in the case of *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, and then says:

"And this is true, though no control or direction over the work is retained and exercised."

Republic Iron & Steel Co. v. Barter, Supra.

The Court affirmed the judgment against the lessor.

CONCLUSION.

While there may be some isolated decisions which because of the peculiar facts of the particular case denied recovery against the lessor to the adjoining landowner for acts of a lessee of a mine, such decisions are in the decided minority, and are not supported by either the weight of reason or justice, and do not appeal to the conscience of the court in this character of a case.

Appellants herein have not cited a single statute, nor decision of the Supreme Court of Montana, upon which this Court would be justified in reversing the judgment of the Court below in this case. On the other hand, there is an unbroken line of Montana decisions upholding the decision of the trial court in denying appellant's motion for a directed verdict; likewise, the decision of this Court

in the case of *Butte Copper and Zinc Company, et al., v. Amerman*, (CCA 9th) 157 Fed. (2nd), 457, determined the question herein involved contrary to the contention of appellant herein. That case was tried and decided on the identical contracts, and was a damage suit arising out of the operation in the same mine as the case at bar.

It is fundamental that the owner of land cannot escape responsibility for the performance of a legal obligation by delegating that obligation to another, regardless of the form that such delegation may take, nor can such owner do indirectly what the law prohibits him from doing directly.

Upon every principle of justice, this decision must be affirmed.

Respectfull submitted,
H. L. MAURY,
AL. G. SHONE,
EARLE N. GENZBERGER,
Attorneys for appellee.

Service of the foregoing brief acknowledged, and three copies thereof received this.....day of September, 1947.

.....
.....
.....
.....

Attorneys for appellant.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S REPLY BRIEF

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,
All of Butte, Montana,

Attorneys for Appellant.

FILED

OCT -2 1947

PAUL P. O'BRIEN,
— OL



INDEX

APPELLANT'S ANALYSES OF CASES CITED IN BRIEF OF APPELLEE.

CASES	Page
Ahlquist v. Mulvaney Realty Co., 116 Mont. 6, 152 Pac. (2d) 137	6
Belcher Lumber Co. v. Woodstock Land & Mineral Co., (Ala.) 15 So. (2d) 625	7
Benton v. Kernan, (N. J.) 13 Atl. (2nd) 825	2, 3
Benton v. Kernan, (N. J. E.) 21 Atl. (2d) 755	3
Butte Copper and Zinc Company v. Amerman, (C. C. A. 9th) 157 Fed. (2d) 457	9
Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45	7
Campbell v. Louisville Coal Co., (Colo.) 89 Pac. 767	2
Catron v. South Butte Mining Co. (C. C. A. 9th) 181 Fed. 941	2
Erie Railroad Company v. Tompkins, 304 U. S. 64	2
Fagan v. Silver, 57 Mont. 427, 188 Pac. 900	3, 4
Holter Hardware Co. v. Western Mortgage Co., 51 Mont. 94, 149 Pac. 489	5
Jones v. Weaver, 123 Fed. (2d) 403	2
Mitchell v. Thomas, 91 Mont. 370, 8 Pac. (2d) 639	6
Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th) 75 Fed. (2d) 79	2
Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805	8
Nisbet v. Lofton, (Ky.) 277 S. W. 828	2
Peters v. Bellingham Coal Mines, (Wash.) 21 Pac. (2d) 1024	9
Railroad Co. v. Morey, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269	7
Republic Iron & Steel Co. v. Barter, (Ala.) 118 So. 749....	2
Sears-Roebuck v. Marhenke, 121 Fed. (2d) 599	2
Stoner v. New York Life Ins. Co., 311 U. S. 336, 61 S. Ct. 336, 85 Law Ed. 284	2

INDEX (Continued)

	Page
U. S. v. Los Angeles Soap Co. (C. C. A. 9th) 83 Fed. (2d) 875	2
Western National Ins. Co. v. LeClare (C. C. A. 9th),Fed. (2d), dec. August 13, 1947....	2

APPELLANT'S ANALYSES OF TEXTS CITED IN BRIEF OF APPELLEE.

1 American Jurisprudence, Sec. 37, p. 527	10
American Law Institute, Restatement of Torts, Section 820, p. 207	11
p. 209	12
Section 822, p. 226	11
Section 837, p. 292	12, 13
2 Corpus Juris Secundum, Sec. 16, p. 17	13
Lindley on Mines, Vol. 3, Sec. 818-819, pp. 2010-2014.....	14

APPELLANT'S ANALYSES OF STATUTES CITED IN BRIEF OF APPELLEE.

Chapter 230, Sections 8735 to 8772, R. C. M., 1935.....	14
Section 6773, R. C. M., 1935	2, 13
Section 8743, R. C. M., 1935	14
Section 8748, R. C. M., 1935	14
Section 2, Article III, U. S. Constitution	14
28 U. S. C., Section 41 (1)	14
28 U. S. C., Section 225	14

TEXTS CITED IN BRIEF OF APPELLANT

36 American Jurisprudence, Sec. 185, p. 407	11
40 Corpus Juris, p. 1195	13
2 Corpus Juris Secundum, Sec. 26, p. 28	13

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

APPELLANT'S REPLY BRIEF

CASES CITED BY APPELLEE.

Appellee in her brief cites twenty-three cases in support of her contentions in this action. Many of those cases relate to matters which Appellant will concede. In this reply brief Appellant will attempt to simplify the argument and reduce it to the consideration of those cases which are urged in support of rules which it does not concede.

Appellant is willing to urge the reversal of this case on the sole ground that the Butte Copper and Zinc Company was not liable for any damages resulting from the operation of the Emma Mine by the Anaconda Copper Mining Company under its lease. With this concession, further consideration of the

cases of Mittry Bros. Const. Co. v. U. S. (C. C. A. 9th), 75 Fed. (2d) 79, U. S. v. Los Angeles Soap Co. (C. C. A. 9th), 83 Fed. (2d) 875, and Western Nat'l Ins. Co. v. LeClare (C. C. A. 9th), Fed. (2d), dec. Aug. 13, 1947, is unnecessary.

Appellant concedes that in a diversity of citizenship case the Federal Court must follow the statutes and decisions of the highest court of the state in which it sits. This concession eliminates any further consideration of Erie Railroad Company v. Tompkins, 304 U. S. 64, Jones v. Weaver, 123 Fed. (2d) 403, Sears-Roebuck v. Marhenke, 121 Fed. (2d) 599, and Stoner v. New York Life Ins. Co., 311 U. S. 336, 61 S. Ct. 336, 85 Law Ed. 284.

The right to lateral and subjacent support as set forth in Catron v. South Butte Mining Co. (C. C. A. 9th), 181 Fed. 941, and in Section 6773 of the Revised Codes of Montana of 1935, is also conceded.

Appellant will also concede that where the owner of a mining claim leases the same for the express purpose of removing the pillars and all supports of the surface ground and collects royalty on the material so obtained, the lessor as well as the lessee is liable. In other words, Appellant concedes the correctness of the rulings in Campbell v. Louisville Coal Co., (Colo.) 89 Pac. 767, Nisbet v. Lofton, (Ky.) 277 S. W. 828, and Republic Iron & Steel Co. v. Barter, (Ala.) 118 So. 749. The Campbell and Nisbet cases above cited are referred to in Appellant's original brief on page twenty-eight. The Iron & Steel Co. case is referred to on page 25.

Benton v. Kernan, (N. J.) 13 Atl. (2d) 825, and

Benton v. Kernan, (N. J. E.) 21 Atl. (2d) 755, and Fagan v. Silver, 57 Mont. 427, 188 Pac. 900, relate to injunctions against the continuance of nuisances resulting from the operation of stone quarries in populous neighborhoods. In the Kernan cases the owner and the lessee were both enjoined from the operation of a plant which necessarily constituted a nuisance. The case of Fagan v. Silver is cited by Appellee as the leading case in Montana on the subject of lessor's liability. Silver owned a quarry, equipped it with machinery and crushed rock for his own use, and in doing so created a nuisance. Silver later turned the operation of the plant over to one Mackey and paid him so much a ton for the rock crushed and placed in bins for Silver's benefit. There is nothing in the case to show that Mackey was a lessee, or even an independent contractor. The statement in Appellee's brief that the owner and the *lessee* were enjoined from the operation of the stone quarry is not based upon any fact in the case and assumes a relationship which did not exist. There is no record of any agreement as to the manner in which Mackey would conduct his operation, or that he had a lease, or that he was an independent contractor, nor what if any control Silver retained over the operation. As far as the record goes, there is nothing to show he was not merely an employee of Silver, the amount of his compensation being dependent upon the number of yards of crushed rock which he produced and processed for Silver's use and benefit in an operation which constituted a nuisance.

Appellee seems to rely upon certain rules set forth

in this case as the basis upon which to hold that Appellant, as lessor of the Emma Mine, should be liable for the operations of the lessee. From that case she quotes the two following paragraphs:

“‘If we consider the facts as applying to the relation of landlord and tenant, appellant cannot escape liability, for the following rules would apply: ‘One who erects a nuisance on his premises cannot escape liability by leasing the same, and his liability extends to the continuance of the nuisance after the lease goes into effect.’ (29 Cyc. 1202; *Anderson v. Dickie*, 26 How. Pr. (N. Y.) 105; *Robinson v. Smith*, 53 Hun. 638, 7 N. Y. Supp. 38; *McCarrier v. Hollister*, 15 S. D. 366, 91 Am. St. Rep. 695, 89 N. W. 862.)

“ ‘Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for the damages resulting therefrom—the lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it; and the lessor, if he first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom is receiving a benefit therefrom by way of rent or otherwise.’ (Jones on Landlord & Tenant, sec. 603.)”

(Appellee’s Brief, p. 5.)

These rules relied on by Appellee are so obviously inapplicable to the present case as to hardly merit discussion. In the first place, they pertain to a nuisance created by the lessor. In the second place, they cite the rule that the lessor is liable only if he first created a nuisance and then demised the premises with the nuisance upon them with the intent of continuing the nuisance through a lessee and re-

ceiving benefits from its continuance. In our present case there is no allegation nor proof of any nuisance. Even if we assume that the operation of the Emma Mine constituted a nuisance such nuisance was not created by the lessor and did not come into existence until after the last of several leases was given to the Anaconda Copper Mining Company by Appellant (R. 45). The last of the several leases entered into by lessor was dated June 24, 1940, whereas the first evidence of any subsidence in the entire area in the vicinity of the Emma Mine was noticed by the Anaconda Copper Mining Company's Chief Engineer, Mr. O'Kelly, in 1941 (R. 293).

Appellee's brief also cites the case of Holter Hardware Company v. Western Mortgage Company, 51 Mont. 94, 149 Pac. 489. She makes the incorrect statement that in that case the Supreme Court of Montana rejected the contention of defendant that there was no liability upon the owner of the premises because the negligence, if any, was that of an independent contractor. In that case the owner of the building entered into a contract to replace sheets of iron in a skylight with glass. The independent contractor did this, but left the sheets of iron upon the roof where they were subsequently blown off and damaged plaintiff's property. The Court specifically held that as there was no contract to remove the debris from the roof, the independent contractor had no duty to remove the same, but that the duty became that of the owner. Thus, in effect the court holds that the negligence was that of the owner and not the independent contractor. This case also held that

the owner in arranging to have repairs made that would probably result in creating a condition dangerous to neighboring property owners was under obligation to provide that reasonable care should be taken to obviate the probable consequences of his act. Thus this case is not in point, as it involves an independent contractor and not a lessee. Furthermore, it involves a contract for the performance of an act which was foreseeably dangerous to the property of third parties. In our case the Emma Mine had been operated by the lessee, Anaconda Copper Mining Company, from 1917 to 1941 without damage to any person's property.

Ahlquist v. Mulvaney Realty Co., 116 Mont. 6, 152 Pac. (2d) 137, and Mitchell v. Thomas, 91 Mont. 370, 8 Pac. (2d) 639, both were cases wherein the owner of property was held liable for injuries to third persons caused by defects in the property.

In the Ahlquist case the defendant leased the premises and facilities with the knowledge that they were to be used for a public use and agreed to maintain these facilities in a safe condition. This it failed to do and it therefore violated its duty to the injured invitee.

In the Mitchell case the defendant-lessor was held liable in damages to a third party resulting from his failure to repair a coalhole which he had placed in the sidewalk adjacent to premises leased by him. The court held that he was liable for such damages, having had actual knowledge of the condition, having been warned by his tenant, by the city engineer and by policemen to repair the defects in the sidewalk and having promised but failed to do so. The court

also recognized that if the entire premises were leased, the weight of authority would have held that the landlord was not liable as he would have no right to enter and make repairs, but here the landlord had retained part of the building and had a duty to keep the sidewalk repaired.

Belcher Lumber Co. v. Woodstock Land & Mineral Co., (Ala.) 15 So. (2d) 625, is an action of trespass and trover against the owner of property which supplied another with machinery and finances to enter its property and engage in mining, but did not inform him of the boundaries of its property. However, ore was taken from adjoining property. This was a case of stealing ore and the court found that the defendant had knowledge of the acts of the persons who did the mining and received royalties on the stolen ore. Under those conditions the defendant was held to be liable. Appellant agrees that you cannot accept the fruits of stolen ore from a lessee with knowledge that it was stolen and escape liability on the ground you are a lessor.

Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, is an action against a city which in excavating for a sewer underneath a street removed quicksand from under plaintiff's land and caused damage. The city was held liable even though the work was done by an independent contractor because the specified work necessarily resulted in damage to plaintiff, and the city knew or should have known that it would do so. The case of *Railroad Co. v. Morey*, 47 Ohio St. 207, 7 L. R. A. 701, 24 N. E. 269, is one where the Railroad Company caused a ditch

to be dug across a street and left it unguarded. Plaintiff fell into the ditch and was injured. This case is merely illustrative of the general rule that where one excavates or places an obstruction in a street or highway he cannot escape liability by having the work done by an independent contractor. In other words, it illustrates the exception to the rule that one is not liable for injuries caused by work of an independent contractor. The rule stated by the court in the two cases last cited is the general rule, but it has no application to the case under consideration.

Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805, is an action for damages resulting from surface excavation. The defendant, Pincus, excavated for a building adjoining premises occupied by the plaintiff. He gave notice of such excavation to the owner of the adjacent lot and the owner employed the same contractor who was working for Pincus to support the ground under plaintiff's building. The building collapsed at the point where this contractor was working. Judgment against the defendant was reversed by the Supreme Court. This case merely states the general rule regarding the natural right which the owner has to lateral support. It has no relevancy or value to determine the issues in this case. The right to lateral support is conceded by the Appellant. The question here to be considered is not whether the owner of land has the right to lateral support, but whether the lessor in an ordinary lease of mining property over which he neither exercises supervision nor retains any right to supervise is liable for damages

resulting from the operation of the mine by a lessee due to causes which neither the lessee nor lessor could have foreseen.

Peters v. Bellingham Coal Mines, (Wash.) 21 Pac. (2d) 1024, is an action against a *lessee* who removed the coal from under plaintiff's property in such a manner as to cause the ground to subside. This damaged plaintiff's property. Judgment against the lessee was affirmed by the court. This case does not in any respect support Appellee's contention that the lessor is the one who is liable in such case.

Butte Copper and Zinc Company v. Amerman, (C. C. A. 9th) 157 Fed. (2d) 457. Appellee seriously tells the Court that the Amerman case is decisive of the issues in this case. The whole issue in this case is the question of the liability of the lessor for the underground mining operations conducted by a lessee. No such issue was raised in the Amerman case. The matter was not presented or argued. The position of the Anaconda Copper Mining Company and the Butte Copper and Zinc Company in the Amerman case was that there was no proof of any damage to Amerman's property resulting from any act of either of the defendants. In the instructions submitted in this case by the defendants and refused by the Court, the Court was asked to instruct the jury that unless it found that the Amerman property had been damaged by operations carried on *by the defendants, or either of them*, the verdict must be for the defendants. See Instructions, Transcript of Record on Appeal, in Butte Copper and Zinc Company and Anaconda Copper Mining Company v. Robert E. Amerman and E.

Aileen Amerman, Case No. 11224, Volume 2, Page 944; Instruction No. 11, page 944; Instruction No. 13, page 944; Instruction No. 21, page 947; Instruction No. 22, page 947; Instruction No. 27, page 949; Instruction No. 30, page 950, and Instruction No. 31, page 951. The language referred to in Appellee's brief on page nine relates to the closing sentence in the opinion of this Court in which it disposes of the request made at the conclusion of Defendant-Appellant's brief wherein they state "we respectfully submit that judgment for plaintiffs should be reversed with direction to enter judgment of dismissal on the merits."

TEXTS CITED BY APPELLEE.

1 American Jurisprudence, Section 37, page 527. This Section deals with the liability of an independent contractor. In quoting it the Appellee omits the portion which explains the application of the Section quoted. The portion omitted and marked by asterisks in Appellee's brief reads as follows:

“*** Most of the cases which illustrate this doctrine relate to the effects of excavations made for the purpose of constructing or altering a building. But it is also applicable with respect to cases in which the damage complained of has been caused by an excavation made for a sewer or a railroad tunnel. There is authority for the doctrine that the liability of a landowner for acts of an independent contractor which have the effect of destroying or impairing the lateral support of the adjoining land may be referred to the principle that the duty of such landowner not to interfere with the right of lateral support is absolute in its quality. ***.”

Clearly, this Section has nothing to do with the rule regarding the liability of a lessee of a mining claim operating under an ordinary mining lease for damage to the surface of the ground above the mine workings. American Jurisprudence does, however, deal specifically with this subject and supports Appellant's view. (36 American Jurisprudence, Section 185, page 407, quoted in the main brief of Appellant at pages 24 and 25).

American Law Institute, Restatement of Torts, Section 822, page 226. The quotation in Appellee's brief of the black letter text setting forth the general rule in Section 822 directly supports Appellant's contention. This Section states that "the actor," that is, the one who does the work, is liable for the damage. This Section relates to interference with the use of land. The rule governing the withdrawal of subjacent support will be found in Section 820 of this same text which says:

"§ 820. Withdrawing Naturally Necessary Subjacent Support.

"(1) Except as stated in § 818, a person who withdraws the naturally necessary subjacent support of land in another's possession or the support which has been substituted for the naturally necessary support is liable for the subsidence of such land of the other as was naturally dependent upon the support withdrawn, in the absence of a superseding cause or other reason for relieving him.

"(2) A person who is liable under the rule stated in Subsection (1) is also liable for harm to artificial additions which results from such subsidence."

At page 207.

In discussing this rule the text goes on to say, at page 209:

“g. Persons subject to liability — liability of transferee. The person liable under the rule stated in this Subsection is the actor who withdraws the naturally necessary support. It is immaterial whether, in respect to the supporting land, the actor be owner, possessor, licensee or trespasser. The owner or possessor of this land is not liable under the rule stated in this Section unless he was an actor in the withdrawal of support.”

so that it is quite clear that the Section quoted in Appellee's brief did not relate to the specific question of the withdrawal of subjacent support. The Section which we have quoted above deals with this subject and supports Appellant's theory.

Appellee also refers to Section 837 of this same text, quoting from the black letter text. The author in commenting on this Section discusses the lessor's liability as follows:

“c. Lessor's Liability. This Section merely states the conditions which must exist before a lessor of land is liable for harmful activities on the land when he has taken no active part in carrying on such activities (see § 834). A lessor of land usually has no control over the conduct of the lessee or the persons upon the leased land while the lessee is in possession of it, and therefore the lessor is not ordinarily responsible for the acts of the lessee or third persons thereon. Where, however, the lessor makes the lease under the condition stated in clauses (a) and (b), he subjects himself to liability.”

At page 294.

Subsections (a) and (b) of Section 837 read as follows:

“(a) At the time when the lease was made, renewed or amended, the lessor consented to the carrying on of the activity, or knew that it would be carried on, and

“(b) the activity, as the lessor should have known, necessarily involved or was already causing such an invasion.”

At page 293.

Neither one of these Subsections has any application to the present case.

2 Corpus Juris Secundum, Section 16, page 17. This section deals with the liability of an excavator for depriving adjoining land of lateral support. It states the general law, but does not deal with the liability for removing subjacent support by mining operations. Further on in this same text, Section 26, page 28, the author says:

“The support of property superjacent to a mine is treated in Mines and Minerals § 278 (40 C. J. p 1195 note 96-p 1197 note 11).”

Appellant in its brief has quoted from 40 C. J., page 1195, (Appellant's main brief page 24). This quotation is directly in point and supports Appellant's view.

Lindley on Mines, Volume 3, Sections 818-819, pp. 2010-2014. This deals with the absolute right of the owner of the surface to support unless such right is expressly waived. With this rule we have no quarrel.

STATUTES CITED BY APPELLEE.

Section 6773 of the Revised Codes of Montana of

1935. This relates to the right of a coterminous owner to lateral and subjacent support from adjoining lands. This is the general law everywhere and is not peculiar to Montana.

Sections 8743 and 8748 of the Revised Codes of Montana of 1935 are maxims of jurisprudence which are universal and are not peculiarly the rules of law in Montana. These and many other maxims of jurisprudence are incorporated into the statutes of Montana. See Chapter 230, "Maxims of Jurisprudence," Revised Codes of Montana of 1935, Sections 8735 to 8772.

The United States statutes referred to in Appellee's brief merely refer to diversity of citizenship, which we concede.

CONCLUSION.

From this analysis of the cases, texts and statutes cited in Appellee's brief it is obvious that none of the cases are based upon similar facts, and that none of the texts or statutes relate to the specific question at issue in this case. We are here confronted with a question of liability of a lessor for the operation of its mine by the lessee. The Butte Copper and Zinc Company is a citizen of the State of Maine and leased a mine in Butte, Montana, to the Anaconda Copper Mining Company in the year 1917; that Company, lessee, operated the mine continuously from that date to the date of the trial. Several renewals of the lease were made, the last one being on June 1st, 1940, twenty-three years after the first lease was

made, and more than a year before any damage resulting from operations under the lease was disclosed. The damage resulted only from a slip of a fault, an unforeseen contingency. There is no negligence either alleged or proven by the Appellee. In fact Appellee states that negligence is not an issue in this case. The mining was done in a careful and workmanlike manner. When the ore was removed the stopes were timbered and then filled. No stoping or removing of ore was done within two hundred feet of the surface and in many places not within three hundred feet. The testimony on this point is uncontradicted. (R. 304-306).

It is clear from this analysis of the cases cited by Appellee in support of her contention that none are in point. It is a valid inference, therefore, that no such cases exist. In other words, the authorities are in complete agreement with Appellant's theory in this case.

Respectfully submitted,

W. H. HOOVER,
R. H. GLOVER,
JOHN V. DWYER,
J. T. FINLEN, JR.,
SAM STEPHENSON, JR.,

Attorneys for Appellant,

616 Hennessy Building,
Butte, Montana.

Service of the foregoing Reply Brief of Appellant

acknowledged, and copy thereof received this.....*1st*.....
day of.....*Oct*....., 1947.

H. L. MAURY,
AL. G. SHONE,
EARLE N. GENZBERGER,
Attorneys for Appellee.

No. 11,633

United States
Circuit Court of Appeals

For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

Appeal from the District Court of the United States
for the District of Montana

PETITION FOR REHEARING

FILED

DEC 8 - 1947

PAUL P. O'BRIEN,

CLERK

H. L. Maury,
Earle N. Genzberger,
A. G. Shone,
Attorneys for Appellee

United States
Circuit Court of Appeals

For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

Appeal from the District Court of the United States
for the District of Montana

PETITION FOR REHEARING

H. L. Maury,
Earle N. Genzberger,
A. G. Shone,
Attorneys for Appellee

INDEX

POINTS AND AUTHORITIES:

	Page
I. Duty and obligation to support rests upon adjoining landowner. Departure from rule in Catron Case.....	2-20
II. Duty cannot be delegated.....	2-20
III. Weight of authority contrary to decision	2-20
IV. Evidence misconstrued by decision.....	20-26
V. Judgment of court contrary to evidence herein	26-27
CONCLUSION	27-28
CERTIFICATE OF COUNSEL.....	29

CASES

Alabama Clay Products Company v. Black, 110 So. 151.....	12, 14
Aston v. Nolan, 63 Cal. 269.....	18
Bower v. Peate, (1876) L. R. I. Q. B. Div. (Eng.) 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321.....	5
Cabot v. Kingman (Mass.) 33 L. R. A., 45 N. E. 344.....	16
Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312; 56 Pac. 358.....	10
Catron v. South Butte Mining Company (C. C. A. 9th) 181 Fed. 941.....	1, 4, 20
Cavanaugh v. Corbin Copper Co., 55 Mont. 173; 174 Pac. 184.....	9
City of Scranton v. Peoples Coal Co., (Penn.) 100 Atl. 818.....	9

INDEX

CASES—Continued

	Page
Covington & Cincinnati Bridge Co. v. Steinbrock, (Ohio) 55 N. E. 618, 619.....	6
Davis v. Wiebbold, 139 U. S. 507, 11 Sup. Ct. Rep. 628	17
Fagan v. Silver, 57 Mont. 427; 188 Pac. 900.....	11
Greek Catholic Congregation v. Plummer, (Pa.) 12 Atl. 2d 435.....	12
Green v. Berge, 105 Cal. 52; 38 P. 539, at p. 541	3, 5, 18
Holter Hardware Co. v. Western Mortgage & Warranty Title Co., 51 Mont. 94; 194 Pac. 489	11
Jackson Hill Coal Co. v. Bales (Ind.) 108 N. E. 962	14
Kistler v. Thompson, (Pa.), 27 Atl. 874.....	15, 18
Luce v. Holloway, 156 Cal. 162; 103 Pac. 886....	6
Mitchell v. Thomas, 91 Mont. 370, 389; 8 P. (2d) 639, 645.....	11
Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211	18
Republic Iron & Steel Co. v. Barter (Ala.) 118 So. 749, at 751.....	12, 13, 14, 18
The St. Paul Water Company v. Ware, 83 U. S. (16 Wallace) 566, 577, 21 L. Ed. 485, at P. 488	7
Ulmen v. Schwieger, 92 Mont. 331, at p. 348, 12 P. (2d) 856, at p. 860.....	6
Wharam v. Investment Underwriters, 136 P. (2d) 363, 365.....	7, 8, 18
Wilkinson v. Bell & Bukvich,.....Mont....., 168 P. (2d) 601.....	25

INDEX

TEXTS

	Page
46 Cor. Jur. 716, Nuisances.....	9
Kinhead on Torts, p. 1324, par. 691.....	9
Note 23 A. L. R. 1016, 1018, 1033.....	5, 6
Restatement of Torts, Sections 820, 837.....	16

 STATUTES

Section 832, California Civil Code.....	4, 20
Section 6773, R. C. M., 1935.....	4, 20
Section 8642, R. C. M., 1935.....	9

United States
Circuit Court of Appeals
For the Ninth Circuit

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Appellant,

vs.

MRS. NELLIE ALLEN POAGUE,

Appellee.

Appeal from the District Court of the United States
for the District of Montana

PETITION FOR REHEARING

Comes now Mrs. Nellie Allen Poague, Appellee in the above-entitled case and presents this, her Petition for Rehearing of said cause and in support thereof respectfully shows:

I. That this Court, in its decision, has departed from the rule of *Catron v. South Butte Mining Company*, 181 Fed. 941, and has not enforced the legal duty and obligation defined in such decision against the party therein stated to be under such obligation, to-wit: the adjoining landowner.

II. That the duty of subjacent and lateral support,

which the Court, in its opinion, concedes to be absolute, cannot be delegated by a contract.

III. That the said decision permitted the delegation of such statutory and common law duty of surface support and is contrary to the overwhelming weight of both English and American authorities.

IV. That the Court has misconstrued the evidence in this case relative to the contracts between the Butte Copper & Zinc Company and the Anaconda Copper Mining Company.

V. That the verdict of the jury and the judgment of the Court below, is supported by the evidence herein in holding that Butte Copper & Zinc participated in the mining operation, contrary to the finding of the decision of this Court.

I, II, III.

The opinion in this case holds and rightly:

“As indicated, appellee asserts that the right of surface support is absolute unless expressly waived, and that on every grant of minerals there is an implied reservation of surface support—that the question of negligence is not involved. (Citing Lindley on Mines, Vol. 3, Secs. 818-819.) Butte makes no contention to the contrary, but concedes this to be the rule in Montana. *It also concedes the right of the surface owner to lateral and subjacent support as set forth in Catron v. South Butte Mining Co., (9 Cir.) 181 Fed. 941, and in Sec. 6773 of the Revised Codes of Montana of 1935, which Code provision relates to the rights of a coterminous owner to lateral and subjacent support from adjoining lands.*” (Op. p. 6.)

Who has the duty to give such surface support? The answer is obviously the owner of the adjoining land—in this case, the owner of the minerals. Against whom must this plaintiff enforce the right which this Court concedes she has? Obviously, the owner of the adjoining land, which is the land underneath and adjacent to her property. There is no difference between this case and the ordinary case involving adjoining landowners, except that the boundaries of the land here run horizontally instead of vertically.

The withdrawal of the support of Nellie Poague's house was the withdrawal of the *lateral* and also *subjacent* support. Where the duty to support exists, the vast weight of authority is that it is absolute, and that the happening of the subsidence and incident damage in breach of that duty *of itself*, causes liability. This question was before the Supreme Court of California in the case of *Green v. Berge*, 105 Cal. 52, 38 P. 539, and at page 541 the Court said:

“Except in the case of *Aston vs. Nolan*, 63 Cal. 269, all the authorities I have been able to find hold that the landowner who causes such an excavation to be made, cannot relieve himself of responsibility by any contract he could make. Cooley, in his work on Torts, speaking of the exceptions to the rule that the master is not liable for the negligence of an independent contractor, or the servants of such contractor, says: ‘He must not contract for that, the necessary or probable effect of which would be to injure others, and he cannot by any contract, relieve himself of duties resting upon him as owner of real estate, not to do or suffer to be done upon it that which will constitute a nuisance, and, therefore, an invasion of the rights of others’.”

In that decision, the Supreme Court of California refers to Section 832 of the California Civil Code, which is identical with Section 6773 of the Revised Codes of Montana, 1935, relied on by the appellees herein.

In the case of *Catron v. South Butte Mining Company*, *supra*, this Court said:

“When the surface of land is owned by one, and the mineral beneath, with the right to extract the same, is owned by another, it is immaterial whether the two interests have been created by a conveyance of the surface with a reservation of the mineral, or by a grant of the mineral with a reservation of the surface. *In either case, the obligation to protect the surface is the same.*”

Catron v. South Butte Mining Company (C. C. A. 9th) 181 Fed. 941.

Upon whom does “the obligation to protect the surface” rest? Unquestionably, upon the owner of the minerals. Does this Court now mean to overrule its decision in the *Catron case*? If this Court meant what it said in the *Catron case*, that there is an obligation to support the surface on the part of the owner of the minerals, can such owner delegate such obligation by a contract to which the owner of the surface is not a party? This is the first question for this Court to determine, and the opinion herein is silent on that point—merely assuming that the contract between Butte and Anaconda is determinative of the rights of the plaintiff in the case, notwithstanding the fact that this poor negress was not a party to such contract.

The Supreme Court of California said:

“The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. Respondent knew, or should have known, that to make the excavation without supplying the support, was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under contract.”

Green v. Berge, (Cal.) 38 Pac. 539, 541.

This rule was probably first announced in the case of *Bower v. Peate*, (1876) L. R. I. Q. B. Div. (Eng.) 321, 45 L. J. Q. B. N. S. 446, 35 L. T. N. S. 321, which the author of the monograph in 23 A. L. R., 1016 says is “the leading case in both England and the United States, and contains the most accurate and comprehensive exposition of the doctrine” for which we here contend:

“A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done, from becoming wrongful. There is no obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.” (23 A. L. R. 1018.)

That case is further quoted from extensively in the note in 23 *A. L. R.*, at page 1033.

That case was quoted with approval by the Supreme Court of Montana and followed in the case of *Ulmen v. Schwieger*, 92 *Mont.* 331, at p. 348, 12 *P.* (2d) 856, at p. 860. The Supreme Court of Montana also quoted with approval from the case of *Covington & Cincinnati Bridge Co. v. Steinbrock*, (*Ohio*), 55 *N. E.* 618, 619, as follows:

“In that case the court stated the general rule as follows: ‘That weight of reason and authority is to the effect that, where a party is under a duty to the public or third person to see that work he is about to do, or have done, is carefully performed so as to avoid injury to others, he cannot, by letting it to a contractor, avoid his liability, in case it is negligently done to the injury of another.’”

Ulmen v. Schwieger, (*Mont.*) 12 *P.* (2d) 856, at p. 860.

The notes in 23 *A. L. R.* comencing at page 1016, particularly at page 1033, et seq., and also the previous note in 23 *A. L. R.* commencing at page 984, are all to the effect that a defendant upon whom there is a duty imposed by law, cannot escape that duty by contracting with another insofar as to bar a recovery by a third person damaged by such non-performance.

See also *Luce v. Holloway*, 156 *Cal.* 162; 103 *Pac.* 886.

The Supreme Court of the United States said:

“It would be monstrous, said Lord Campbell, if a party causing another to do a thing, were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act to be done, which may be accepted

as correct if applied in a case where the work contracted to be done will necessarily, in its progress, render the street unsafe and inconvenient for public travel. *Ellis v. Gas Cons. Co.*, 2 Ell. & Bl., 770; *Newton v. Ellis*, 5 Ell. & Bl., 124; *Lowell v. R. R. Co.*, 23 Pick. 31. More than one party may be liable in such a case, nor can one who employs another to make such an excavation relieve himself from liability for such damages as those involved in the case before the court, by any stipulation with his employe, as both the person who procured the nuisance to be made and the immediate author of it are liable. *Storrs v. Utica*, 17 N. Y., 108; *Creed v. Hartmann*, 29 N. Y., 591; *S. C. 8 Bosw.*, 123; *Congreve v. Smith*, 18 N. Y., 79; *Congreve v. Morgan*, 18 N. Y., 84; *Shearm. & Redf. Neg.*, 423; *Mayor F. Furze*, 3 Hill, 616; *Milford v. Holbrook*, 9 Allen, 21."

The St. Paul Water Company v. Ware, 83 U. S. (16 Wallace) 566, 577, 21 L. Ed. 485, at p. 488.

A comparatively recent California case is that of *Wharam v. Investment Underwriters*, 136 P. (2d) 363, 365. The Court will note the words "joint enterprise" in the quotation from that case:

"The last point remaining for consideration is the contention of the appellant land owner that there is no liability as to it because the excavating was done by an independent contractor. This contention is clearly determined against the defendant land owner by California authority. In this case, the land owner and contractor are both liable as joint tortfeasors for negligent trespass, for negligence in excavating on defendant's lot, and as parties to a joint enterprise which deprived the plaintiff of his common law right of lateral support. *Green v. Berge*, 105 Cal. 52, 38 P. 539, 45 Am. St. Rep. 35; Hed-

strom v. Union Trust Co.,* Supra; 2 C.J.S., Adjoining Landowners, 17 p. 18.”

And again:

“The defendants are liable as joint tort-feasors for negligence in excavating on defendant’s lot, and for the removal of lateral support, because in the case of Green v. Berge, supra, our Supreme Court held that a coterminous owner and his contractor are liable jointly for the fall of adjacent property when not supporting it properly on excavation, thereby overruling the prior case of Aston v. Nolan, 63 Cal. 269. This holding is supported by the weight of authority throughout the United States. See comment 20 Cal. Law Review 62, at page 67, and authorities there cited; 2 C. J. S., Adjoining Landowner, 16 p. 17; 1 A. J. 527.”

Wharam v. Investment Underwriters, 136 P. (2d) 363, 365.

There is nothing sacred about mining operations in the eyes of the courts.

“The question of nuisance vel non is not to be determined in the abstract. Every case must be considered with reference to its own peculiar facts and circumstances. No one would have the temerity to contend that mining is per se a nuisance; but it is elementary that a business otherwise lawful and useful may become a nuisance, by reason of its location or the manner in which it is conducted.

* * * * *

“If the evidence brings appellant’s mining operations within the definition given in Section 6162 above, it is no defense to say that they were carried on according to approved methods, or that in maintaining the nuisance, appellant exercised due care, or that mining is necessary to the industrial life of the particular district. Community benefits cannot be

* (Cal.) 94 Pac. 386.

urged as justification for the injury or destruction of private property without compensation."

Cavanaugh v. Corbin Copper Co., 55 Mont. 173, 174 Pac. 184.

The Montana Statute defining a nuisance is:

"Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

8642, R. C. M., 1935.

The text books, encyclopedias, judicial decisions speak of withdrawals of lateral support when there is no invasion of the property itself as nuisances.

Kinthead, in his work on Torts, discusses such in a chapter on "Injury to Real Property by Nuisances," at par. 691, page 1324.

"If the removal of coal causes such a subsidence in a public street as to cause a nuisance therein, it is no defense that the mining is skillfully done."

City of Scranton v. Peoples Coal Co., (Penn.), 100 Atl. 818;

Nuisances, 46 Cor. Jur. 716.

In this case, the evidence showed that prior to 1917, the defendant Butte had operated the Emma Mine under plaintiff's property. That following the 1917 Lease and subsequent thereto up to the time of the action, Anaconda, under contract with Butte *re-mined* a portion of the territory underlying plaintiff's property and extracted there-

from, ores which had been left during the previous operations of defendant. The map exhibits and the evidence of the engineers showed those facts.

In *Cameron v. Kenyon-Connell Commercial Co.*, 22 Mont. 312; 56 Pac. 358, Judge Hunt, a former honored member of this Court (and in fact, the only Montana jurist ever to have membership thereon), said, in speaking of the delegation of statutory and common law duties owed by a corporation and the directors thereof to the public:

“A company charged with an obligation of this nature, cannot devolve it upon another in a manner so as to exonerate the company from a liability for an injury caused to a third person by the negligent way in which the duty pertaining to the care of giant powder or other dangerous explosives may be executed. In torts, the relation of principal and agent cannot relieve the wrongdoer. (*Berghoff v. McDonald*, 87 Ind. 559.)”

And again:

“This rule grows out of ‘the greatest principle of social duty that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it.’” (*Farwell v. B. & W. Railroad Co.*, 4 Metc. (Mass.) 49.) It is likewise their duty to avoid the creation of nuisances by their corporation, through its employes acting within the line of their duties.

“Nor will inaction by itself overthrow the force of this obligation upon trustees to so control their corporation’s business as to not negligently injure third persons.”

Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312; 56 Pac. 358.

We have heretofore quoted the decision of the Supreme Court of Montana to the same effect that statutory and common law duties to the public cannot be delegated to another, and in the case of *Fagan v. Silver*, 57 Mont. 427; 188 Pac. 900, the owner of the adjoining property was held liable whether the actual actor was a lessee or an independent contractor. The owner was also held liable in the earlier case of *Holter Hardware Co. v. Western Mortgage & Warranty Title Co.*, 51 Mont. 94; 149 Pac. 489, and in the case of *Mitchell v. Thomas*, 91 Mont. 370, 389; 8 P. (2d) 639, 645, the Court said:

“* * * and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then, should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact, those decisions which make the statement that it does, *overlook the public duty of the owner and consider the duty of the landlord and tenant inter sese.*” (Italics ours.)

We submit that the decision in this case does overlook *the public duty of the owner of the minerals* and has merely considered the relationship of Butte and Anaconda *inter sese* without regard to the rights of plaintiff who was not a party to such contracts.

Not one of the cases cited by the Court in its opinion, supports the conclusion reached by this Court, but on the contrary, some of these cases support the rule for which we contend—that the landowner and his lessee or contractee are both liable in this character of a case.

The first case cited on page 4 of the opinion, is that of *Greek Catholic Congregation v. Plummer*, (Pa.) 12 Atl. 2d. 435. That action involved the ownership of coal alleged to have been wrongfully taken from plaintiff's land by defendants. It was a suit to recover for 25,472 tons of coal taken from land which the defendant had *quit-claimed* to a lessee in settlement of a controverted title. This was not a subsidence case in any way, and in fact the defendant did not own the property when the mining was done, and did not profit thereby. No Pennsylvania statute is cited or relied upon in that case which is applicable here. It does not support the rule of non liability of an owner of a mining claim who draws royalties and otherwise participates in the proceeds of the ore mined. That case is again cited at the top of page 5 of the opinion, as authority for the statement: "The lessor of mining property is not liable for subsidence of the surface caused by mining operations of its lessee." That question was not involved in the *Greek Catholic Congregation case*, nor necessary to that decision.

The case of *Alabama Clay Products Company v. Black*, 110 So. 151, reversed a judgment in favor of the plaintiff, as householder, against the defendant mining company because the court below erroneously overruled a demurrer to one count of the complaint. That decision does not support the appellant in this case as shown in the subsequent decision of the Supreme Court of Alabama, in the case of

Republic Iron & Steel Co. v. Barter (Ala.) 118 So. 749, at p. 751. A later Alabama case which is directly in point with the case at bar because here, as in that case,

Butte Copper and Zinc had previously opened the mine under plaintiff's property, had mined certain ores and had apparently left sufficient support for the surface. Later Anaconda, under a lease from Butte, re-mined this property, and the plaintiff's property subsided. The case of *Republic Iron & Steel Co. v. Barter (Ala.)* 1928; 118 So. 749, was an action by the owner of the surface against the owner of the mineral rights thereunder, and it appeared that the defendant in the past, opened a mine under the plaintiff's property and had mined the coal therefrom, leaving pillars and stumps sufficient for subjacent support of the surface, but for several years past, had not operated the mine. Later, defendant leased the property to one Blackwell to mine the coal that was left, and provided that "the lessee is to secure from all surface owners, written releases relieving the company from damage claims as a result of mining operations, breaking the surface, etc," and gave to the lessee full charge of the operations. The lease also contained a clause "that the lessee shall save the company harmless against * * * and pay any claims of any owners of the surface." The surface subsided, and the appellant owner contended that Blackwell, the lessee and not the lessor, was liable. Appellant in its brief, quoted one paragraph from page 751 of the Republic Iron & Steel Co. case, but omitted the following paragraphs:

"Yet where, as here, the lease contemplates and expressly authorizes the lessee to rob the mine of pillars, and leave the surface without subjacent supports, the lessor as well as the lessee, is liable. Little Schuylkell Navigation R. Coal Co. v. Tamaqua, 1 Walk. (Pa.) 488; Campbell v. Louisville Coal Min-

ing Co., 39 Colo. 379, 89 P. 167, 10 A. L. R. (N. S.) 822. This on the principle embodied in the maxim "Sic utere tuo ut alienum non laedes." *Williams v. Gibson*, 84 Ala. 228, 233, r. S. 350, 5 Am. St. Rep. 368, 60 Atl. 924, 69 L. R. A. 637.

"The principle is established by universal authority that the right to subjacent support, unless waived by express stipulation, is absolute, and the owner of the servient estate is liable for its destruction without regard to whether it is destroyed by or through negligence or design, without negligence. *Ala. Clay Products Co. v. Black*, 110 So. 151; *West Pratt Coal Co. v. Dorman et al.*, 161 Ala. 389; 49 So. 849, 23 L. R. A. (N. S.) 850, 135 Am. St. Rep. 127, 18 Ann. Cas. 750.)

Republic Iron & Steel Co. v. Barter (Ala.) 118 So. 749, at p. 751.

With reference to the duty of surface support, the Supreme Court of Alabama, after the decision in the case of *Alabama Clay Products v. Black*, *supra*, relied upon by this Court, said:

"It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate.

"* * * * And this is true, though no control or direction over the work is retained and exercised."

Republic Iron & Steel Co. v. Barter, supra.

So that the Alabama law cited does not support the conclusion of this Court at page 5 of the opinion.

The Court also cites the case of *Jackson Hill Coal Co. v. Bales (Ind.)* 108 N. E. 962. No facts are stated in that

opinion, but it does appear that the Court did give Instruction No. 2 (see 108 N. E. at p. 964) to the effect that "the owner of the minerals could not remove same without leaving proper support for the surface." That case apparently held the *owner* of the mine and not the *lessee*, liable. It does not support the proposition for which this learned Court has cited it.

The Pennsylvania case of *Kistler v. Thompson*, 27 Atl. 874, was an action brought by the owner of a dwelling house against the defendant owner of a mine for work done by a lessee thereof which injured plaintiff's house and lot. The Supreme Court passed upon the charge of the Court below to the jury in that case. In that charge, the Court differentiated between the diversion of a subterranean hidden stream of water and the disturbance of the surface; and, the Court charged that the owner is required to leave enough coal to support the surface, or if he takes out all of the coal (he being the owner), he must substitute sufficient supports to keep the surface in place. That is a duty that is imposed upon him, and the Court points out the distinction between surface cracks so caused which divert a stream of water from the surface, and the tapping of a subterranean stream. The Supreme Court of Pennsylvania, in approving this charge to the Jury, said:

"The defendant was the owner of the mine. He received the royalty for the coal taken out. It was his interest to have as much coal taken out as was possible, and did give frequent and explicit directions as to taking coal from the pillars and supports of the mine."

Admittedly there was control there, but the question would probably have been decided likewise without the evidence of control. In that case, the written leases had been lost, and the Court admitted oral evidence of the contents of the leases.

In the case of *Cabot v. Kingman* (Mass.) 33 L. R. A., 45 N. E. 344, it was held that sewer commissioners were liable together with the independent contractor for destruction of lateral support in constructing a sewer irrespective of the question whether or not control over the manner of operation had been retained.

It is interesting to note that in each of the cases cited by this Court on page 5 as supporting the rule that the lessor of mining property is not liable for subsidence, that the lessor was in fact, held liable and that judgment was rendered in favor of the injured landowner against the lessor, even though the operations in control of the lessee caused the damage.

We ask the Court in all fairness to again read these decisions upon which it relied on page 5 of the opinion, and reconcile the conclusion reached with the statements made by the Alabama court in *Republic Iron & Steel Com. v. Barter*, supra, "That it (the owner) cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right *and rests upon the owner of the servient estate.*"

The Court in its opinion at page 5 cites *Sections 820 and 837 of the Restatement of Torts*. The rule, Section 837 and Paragraph d of 837, shows the exact state of facts here. We again call to the attention of the Court that the

original 1917 lease was upon an existing mine owned and operated at that time by this defendant. We have argued this case upon the hypothesis that Butte owned the minerals underlying the Poague property by reason of its extra-lateral rights in the Emma Czarromah vein, but in using this hypothesis, we do not concede that the appellant had title to any ground vertically beneath Nellie Poague's property. The Nellie lode was located after the townsite title, was actually superior to appellant's lode claim title.

Davis v. Wiebbold, 139 U. S. 507; 11 Sup. Ct. Rep. 628

The joint enterprise contracts contemplated trespass against her land underneath the surface on the known dip of the vein, and for such trespass, the lessor agreed and got equal division of the fruits.

The almost absolute liability spoken of in the Restatement for withdrawal of *subjacent* support originates from the knowledge that subsidence therefrom is inevitable at some time. Such lack of contingency was known when all the contracts were drawn. When this is considered, even under the erroneous theory of appellant adopted by the Court, Butte is liable. The Court will recall the language of the Wharam case, *supra*, "it was the purpose of the contractor to trespass on plaintiff's lot." The presumption from Poague's possession is for this appeal proof enough of her title. Had it been assailed, such assault would have failed under the *Davis-Wiebbold* case, *supra*.

It would also startle legal students in Massachusetts, Alabama and Washington, to read the interpretation that

this Court has placed upon the decisions quoted on page 5 of the Court's opinion. Each of those cases reached the conclusion contrary to that of the Circuit Court of Appeals in the Ninth Circuit, in the cases cited. Indeed, there were only two cases in the United States which directly support the conclusion reached.

Aston v. Nolan, 63 Cal. 269, the early California case, which was expressly overruled in *Green v. Berge*, supra, and *Wharam v. Investment Underwriters*, supra, and the 1846 Pennsylvania case of *Offerman v. Starr*, 2 Pa. 394; 44 Am. Dec. 211, which was a case where the lessee started mine in question from the grass roots, and where the lessor never did have a mine on the premises. Yet the doctrine of that case was not followed in the later case of *Kistler v. Thompson (Pa.)*, 27 Atl. 874, nor in the numerous other Pennsylvania cases which have upheld recovery cases against the lessors, as well as the lessees in possession of coal mines in that state. Indeed, as pointed out by the Supreme Court of Alabama in *Republic Iron & Steel Co. v. Barter*, 118 So. 749, the rule which this Court now adopts, was merely *dictum* in the three cases therein cited.

Of course, not only is the law absolute that the adjacent owner contracting for, or authorizing the work on his land (a servient tenement), by any contractor is liable but that is the public policy. It is often idle to sue an independent contractor, for he might be insolvent.

If the Court inquires mentally why the actor was not joined as a defendant, the answer is to look to the Constitution of the United States, and note that even in 1789,

it was known that the local power and influence of some people required the establishment of courts of greater power to insure justice for persons without local influence.

Upon the oral argument, the advantage in coming to the Federal Court in this case, was stated to be to secure a jury made up of citizens of the neighboring counties to the County of Silver Bow, where there would be less local influence brought to bear on such jury.

In closing the oral argument, the counsel for appellant made a disparaging remark relative to the judge of the Court below and alleged that the reason that this case had been brought in the United States Court, was because the then Federal Judge had been formerly a law partner of one of plaintiff's counsel. Coming as it did at the close of the argument, no opportunity was given to reply to this uncalled for and untruthful remark, but it apparently had its effect upon the minds of the judges who heard the argument.

The facts are that Judge James H. Baldwin died suddenly, October 26, 1944. At the time of his death, there was pending, or had been settled in his court, the following subsidence cases arising out of the same contentions as exist in the case at bar.

Lloyd v. Butte Copper and Zinc, filed November 19, 1941;

Thorne et al v. Butte Copper and Zinc, filed November 18, 1943;

Ed Bolever v. Butte Copper and Zinc, filed October 9, 1944;

Mary Eschenbacher v. Butte Copper and Zinc, filed October 6, 1944;

Susan R. Bolever v. Butte Copper and Zinc, filed
October 5, 1944.

All of these cases have been paid. Anaconda was not joined. The counsel were the same. The partnership ended 15 years ago, of Maury, Brown and Maury.

IV.

THE CONTRACT RELIED UPON BY THE COURT
HEREIN TO DEFEAT PLAINTIFF'S CLAIM IS
NOT AN ORDINARY LEASE, BUT A JOINT
ENTERPRISE OR GENERAL PARTNERSHIP
AGREEMENT.

Relying upon the general principle laid down by this Court in the case of *Catron v. South Butte Mining Company*, 181 Fed. 941, and the Montana Statute, 6773, R. C. M., 1935, which was taken from the California Statute, Section 832 of the California Civil Code, and the decisions made pursuant thereto, the nature of the contracts between Butte and Anaconda were regarded as being of secondary importance because the decisions of both Montana and California, as well as the overwhelming weight of American and English authorities, was to the effect that such duties and obligations as were owed by the owner, were non delegable, and that therefore, the rights of this plaintiff to subjacent and lateral support could not be affected by such contracts. However, the Circuit Court of Appeals in the decision, now holds to the contrary, and holds in effect that the contract between Butte and Anaconda was an ordinary lease finding, and we quote from page 3 of the opinion:

“Butte merely leased its mining property to Anaconda for a percentage of the net returns from the ores and minerals extracted. It did not agree to share any losses from such operations and the right to work the mining property and the right to possession thereof, was the right of Anaconda.

Both of these statements in this quotation are erroneous and are contradicted by the Record in this case.

We contend that the contract did not constitute an ordinary lease for these reasons:

First—in an ordinary lease, the royalties, usually from 10% to 20%, are based upon net smelter returns, and the landowner receives that proportion of the proceeds of ores smelted, regardless of mining or development costs, or the profit or losses to the lessees. Not so with the Butte-Anaconda contract. At page 389 in the Agreement of June 1, 1933, (Exhibit 10), it is provided:

“1. The said agreement between the parties hereto dated the 7th day of June, 1932, shall be terminated as of the 1st day of June, 1933, provided that the Mining Company shall be entitled to deduct, as hereinafter provided in paragraph 4, all amounts expended pursuant to said agreement, as well as any and all amounts expended *or to be expended* under said lease, and this agreement, in arriving at the net returns of *any future operations* and making the division provided in Article Fourth of said lease.

“2. The Mining Company agrees to expend over the three months’ period, beginning June 1, 1933, and ending August 31, 1933, approximately the sum of Forty-five thousand Dollars (\$45,000) in the aggregate for (a) repairs to levels, stopes and working places in the mines covered by said lease, (b) reconditioning the mining machinery and equipment, and

(c) for all other purposes required by said lease, including all expenditures made during the month of June, 1933, by the Mining Company under the above-mentioned agreement dated the 7th day of June, 1932. The Mining Company shall deliver to the Zinc Company, on July 15, 1933, August 15, 1933 and September 15, 1933, a certified statement showing its expenditures under this paragraph 2.

* * * * *

“4. Before making any division of the net returns *of any future operation* under said lease or paying any part thereof to the Zinc Company, as provided in Article Fourth of said lease, the Mining Company shall be entitled to and shall deduct from such net returns

(a) All amounts heretofore expended by the Mining Company under the terms of said agreement dated the 7th day of June, 1932;

(b) All expenditures heretofore made under said lease and which have not been heretofore deducted from said returns, and which by the terms of said lease, the Mining Company is entitled to deduct before making any division of said returns;

(c) All *expenditures hereafter made by the* Mining Company under said lease and which, by the terms thereof, the Mining Company is entitled to deduct before making any division of said returns; and

(d) All expenditures made or to be made under the terms of paragraph 2 hereof; it being understood that the Mining Company *shall be entitled to make such deductions* regardless of the period of time required to provide net returns sufficient to equal such deductions, and that until the net returns *of future operations* have been sufficient to provide not only for the items referred to in said Article Fourth, but for the foregoing items as well, the Zinc Company shall not be en-

titled to any part of the net returns of such operations." (*Italics ours.*)

R. pp. 389-391.

This was followed by the agreement of June 24, 1940, by which time the \$45,000 indebtedness named in Paragraph 2 above (R. p. 389) had grown to \$357,656.77.

That agreement cancelled the lease dated the 6th day of July, 1917, and all amendments and modifications thereof, but provided:

"It is understood that such cancellation shall not affect any rights or obligations which may have accrued under said lease dated the 6th day of July, 1917, and said amendments and modifications thereof, prior to the date of such cancellation. (Italics ours.)"

R. pp. 403-404.

At R. pp. 404-405, that agreement further provides:

"Third: Before making any division of the net returns of the operation of the property under this lease, or paying any part thereof to the Zinc Company as herein provided, the Mining Company shall be entitled to and shall deduct from such returns, all amounts now remaining undeducted and unpaid which the Mining Company has been and is entitled to deduct under the terms and provisions of the agreement of June 1, 1933, between the parties hereto, and the latter agreement between the parties hereto of December 10, 1934, and the said original lease of July 6, 1917, between the parties hereto, and by and all amendments and modifications thereof.

"That the amount to be deducted by the Mining Company, as herein provided, has been audited and agreed to as the sum of Three Hundred Fifty-seven Thousand Six Hundred Fifty-six and 77/100 Dollars (\$357,656.77) as of January 1, 1940, and it is understood and agreed that the Mining Company shall

be entitled to deduct said amount as adjusted to the date hereof from the net returns of any future operation under this lease before making any division of the net returns as hereinafter provided, or paying any part thereof to the Zinc Company, and shall be entitled to deduct said amount, regardless of the period of time required to provide net returns sufficient to equal such deduction, and that until the net returns of future operations, as hereinafter defined, have been sufficient to provide said amount, the Zinc Company shall not be entitled to any part of the net returns of the operation of the property.

"The Mining Company shall be entitled to retain and keep for its own use and benefit, fifty per cent (50%) of the net returns from all ores and minerals mined hereunder, and shall account for and pay to the Zinc Company, the remaining fifty per cent (50%) of said net returns. The Mining Company shall account to the Zinc Company for said fifty per cent (50%), to be paid to the Zinc Company within fifteen (15) days after receiving settlement from the smelter or reduction works, for the ores and minerals shipped. * * *

R. pp. 404-406.

We ask the Court to bear in mind that at the time of the original lease in 1917, the leased premises was a known and producing mine, not a prospect, and that there had been at that time and at all times since, "net returns" from ores mined therein in the sense of the ordinary mining lease. These ores were the exclusive property of Butte, and yet, under the agreements, Butte was called upon to share the losses because its property, as of January 1, 1940, had an agreed lien upon it in the amount of \$357,656.77. (See R. p. 405.) Certainly the property of Butte was called upon to pay the losses of the operation.

Under the laws of Montana, these contracts were nothing more nor less than a general partnership or a joint enterprise for the conduct of a mine.

Wilkinson v. Bell & Bukvich,*Mont.*....., 168 P. 2d 601.

Contribution to any partnership may be made in ore as well as in money.

Second—an ordinary mining lease is usually given on definite, specific mining property. The 1940 lease and its predecessors since 1917, after describing the several properties covered by the lease, adds:

“Also, all other real property, property rights and interests in property situated in the County of Silver Bow, State of Montana, lying adjacent to or in the immediate vicinity of any of the property above-described, and which the Zinc Company owns or has acquired, *or may acquire during the term of this lease* * * *.” (Italics ours.)

And again:

“It is understood and agreed, that if the Zinc Company shall, during the life of this lease, acquire any other real property or interests in property lying adjacent to or in the immediate vicinity of any of the above described property, that the property or property rights so acquired, shall, during the remainder of this lease term, be subject to and covered by the terms of this lease, and be leased and let hereby to the same effect as if fully described herein.”

R. pp. 402-403.

Third—the contract is not an ordinary lease, for the reasons that the *losses were charged against the property* of the lessor, and that the lessor was bound by the terms of the contract as to any other property which Butte

might thereafter acquire, and it also provided (R. p. 408) as to re-working the mine for the purpose of utilizing low-grade rhodochrosite or carbonate of manganese ores present, and to some extent, developed in said properties. It was the ore mined for the purpose of extracting these ores after 1940, which caused the subsidence of plaintiff's property.

The Butte Copper & Zinc Company contributed its property and known ore bodies; the Anaconda Company furnished the skill, experience, staff, smelter and metallurgical facilities, and also agreed "to advance the necessary money to be repaid from operations." Butte Copper & Zinc participated in the expense of operations. They pledged their property against such expense; they could not secure profits until those expenses were paid. An ordinary mining lease does not so provide. A partnership agreement or an agreement for a joint enterprise or joint venture, does in fact, so provide. If this was a mere lease as stated by this Court in its opinion, Butte Copper & Zinc Company would receive a stipulated royalty, based upon the smelter returns from each ton of ore extracted from the mine and shipped to the smelter.

V.

These contracts were before the Court below, and upon the basis of those contracts, the Court instructed the jury that if they found from the evidence—which included these contracts and maps showing the old workings and the testimony of the engineers—that these operations were carried on "with the knowledge and consent of the defendant, Butte Copper & Zinc Company, as its lessee,"

that Butte would be liable. (R. p. 338; also R. p. 349.) The Court also instructed the Jury (R. p. 347) that the plaintiff had and has an absolute right to subjacent and lateral support for the surface and * * * the surface owner has the right to demand sufficient support.

The Court below and the jury found that the obligation to support was that of the owner of the underlying strata—which was Butte. The contracts and the evidence herein, were sufficient to support the verdict of the jury that the mining was done with the knowledge and consent of the defendant, Butte, and that the defendant Butte participated in the profits thereof, and in fact, the record also showed that the earlier contract prescribed the work that was to be done by Anaconda. The 1940 contract provided for the re-mining of the unmined ores, which were left after Butte's previous operations.

To say that the plaintiff has a right to support, and that the owner of the subterranean strata has an obligation to perform, and then to refuse to enforce such obligation, is a denial of justice to the colored woman, who is plaintiff in this case.

CONCLUSION

In our opinion, the decision is erroneous upon the grounds stated herein. The almost unanimous weight of American and English authority is against the conclusion reached by this Court—that the duty to support the surface can be delegated or that a landowner can escape his duty to his neighbor by a contract with a third party to which such neighbor is not a party. The authorities

cited by this Court at page 5 of the opinion, do not support the proposition for which they are cited, and are, if read completely, directly opposed to the conclusion reached by this Court.

The decisions of the Supreme Court of Montana heretofore cited, and the decisions of the Supreme Court of California, under the apposite statutes of California, are all opposed to the conclusion reached by this Court.

The doctrine of this decision is a vicious one in that it departs from the time established rule relating to the right of absolute support of the surface, and the obligation upon the part of the owner of the minerals, and permits such owner to defeat the *right* and evade the *obligation* by leasing his land to an individual or corporation who may be insolvent or irresponsible. It now permits one to injure his neighbor with impunity, providing he does so through a third person.

We ask this Court to again examine the decisions and the Record herein, that it grant a rehearing, and that on such rehearing, that the judgment of the Court below be affirmed.

Respectfully submitted,

H. L. Maury,

Earle N. Genzberger,

A. G. Shone,

Attorneys for Appellee

CERTIFICATE OF COUNSEL

We, the undersigned counsel for the above named Appellee, Mrs. Nellie Allen Poague, do hereby jointly and severally certify that the foregoing Petition for Rehearing of this case, is presented in good faith, and that in our judgment, it is well founded, and that it is not interposed for delay.

H. L. Maury,

Earle N. Genzberger,

A. G. Shone,

Attorneys for Appellee

Service of the foregoing Petition for Rehearing acknowledged and 2 copies received this.....
day of December, 1947.

W. H. Hoover,

R. H. Glover,

John V. Dwyer,

J. T. Finlen, Jr.,

Sam Stephenson, Jr.,
Attorneys for Appellant

No. 11634

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY - CHEMICAL CORPO-
RATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

SEP 20 1947

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY - CHEMICAL CORPO-
RATION, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Adoption of Points on Appeal.....	293
Amended Answer.....	17
Answer	8
Appeal:	
Adoption of Points on.....	293
Bond for Costs on.....	287
Notice of.....	282
Order Re Bond of.....	286
Statement of Points on.....	289
Bond for Costs on Appeal.....	287
Complaint	2, 5
Clerk's Certificate.....	290
Judgment	272, 274
Motion for New Trial.....	276, 277
Motion Re Exhibits.....	284
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	282
Order Denying Plaintiff's Motion for New Trial	279, 280
Order Re Bond of Appeal.....	287
Order Re Transmission of Plaintiffs' Exhibits to Circuit Court of Appeals.....	285, 286
Record of Proceedings at the Trial.....	22
Reply	13, 14
Reply to Defendant's Amended Answer.....	20

INDEX	PAGE
Ruling of the Court on Plaintiffs' Motions for New Trial.....	268
Statements of Points on Appeal.....	289
Stipulation Amending Complaint.....	15, 16
Witnesses, Defendant:	
Batjer, L. P.	
—direct	235
—cross	240
Regan, William S.	
—direct	179, 261
—cross	204
—redirect	233, 234
—recross	233
Squire, Fred C.	
—direct	172
—cross	176
—redirect	178
—recross	179
Witnesses, Plaintiff:	
Emerson, E. A.	
—direct	28, 254
—cross	51
—redirect	73, 84
—recross	80
Evans, John P.	
—direct	149
Keck, J. D.	
—direct	153
—cross	163

INDEX

PAGE

Witnesses, Plaintiff—(Continued):

Luce, W. A.

—direct	106
—cross	110
—redirect	116, 118
—recross	118

Matson, Harold

—direct	164
---------------	-----

Miland, Elmer

—direct	242
—cross	248
—redirect	252
—recross	252

Reeves, E. L.

—direct	86
—cross	90
—redirect	93

Regan, William S.

—direct	25, 94
---------------	--------

Stahler, H. K.

—direct	121, 253
—cross	133, 254
—redirect	144
—recross	149

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

BROWN & HAWKINS,

Miller Building,
Yakima, Washington.

Attorneys for Plaintiff and Appellant.

SKEEL, McKELVEY, HENKE, EVENSON &
UHLMANN,

Insurance Building,
Seattle 4, Washington.

Attorneys for Defendant and Appellee.

In the Superior Court of the State of Washington,
in and for Yakima County

Court No. 33700

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

COMPLAINT

Come now the above-named plaintiffs and for
cause of action against the defendant allege:

1.

That the plaintiff J. D. Keck is the owner and
the plaintiff Harry K. Stahler is the tenant occu-
pying the following described real estate located in
the County of Yakima, State of Washington, to-
wit:

The south half of the northeast quarter and
the northeast quarter of the southeast quarter
of Section 11, Township 14 North, Range 17,
E.W.M.

That the said tract of land is planted to a com-
mercial orchard and that the plaintiffs jointly own
the crop of fruit now growing thereon.

2.

That the defendant is engaged in the business in
Yakima County, Washington, of distributing vari-

ous types of orchard spray, including a spray known as "Elgetol 30". That in the Spring 1945, the plaintiffs were interested in securing a spray for the control of mildew in the Jonathan, Rome Beauty and Winesap orchards on the above-described premises and that in connection therewith the plaintiff Stahler consulted with an officer and agent of said corporation, namely, William S. Regan, chemical and technical adviser [1*] of said defendant corporation, and was advised by him that the said Elgetol 30, when properly mixed and applied, would be effective in the control of mildew.

3.

That the plaintiff Stahler was advised by said Regan how to mix said spray and how to apply the same.

4.

That the plaintiffs followed the instructions of the agent of said defendant corporation and mixed and applied said spray as directed by it and that as a result of said application as directed by the defendant corporation all the blossoms on the Jonathan orchard and a large portion of the blossoms on the Rome Beauty and Winesap orchards located upon the above described premises were totally destroyed. That the said defendant corporation, its officers and agents, knew or should have known that such a result would ensue.

* Page numbering appearing at foot of page of original certified Transcript of Record.

5.

That by reason of the destruction of said blossoms the production of said orchards was reduced by more than 5000 boxes of Jonathan apples, more than 5000 boxes of Rome Beauty apples and more than 5000 boxes of Winesap apples, which would have netted the plaintiffs, over and above all costs of operation, harvesting, packing, etc., not less than \$36,346.64, all to plaintiffs' damage in that amount.

Wherefore, plaintiffs pray for judgment against the defendant for the sum of \$36,346.64, together with their costs and disbursements herein.

BROWN & HAWKINS,
Attorneys for Plaintiffs. [2]

State of Washington,
County of Yakima—ss.

J. D. Keck, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

J. D. KECK.

Subscribed and sworn to before me this 1st day of September, 1945.

NAT. U. BROWN,
Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed D. S. Oct. 11, 1945. [3]

In the Superior Court of the State of Washington,
in and for Yakima County

Court No. 33734

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

COMPLAINT

Come now the above-named plaintiffs and for
cause of action against the defendant allege:

1.

That the plaintiffs are the owners of the follow-
ing described real property situate in the County of
Yakima, State of Washington, to-wit:

North half of northwest quarter of the south-
west quarter of the northwest quarter, and the
northwest quarter of the northeast quarter of
the northwest quarter; and the west half of the
southwest quarter of the northeast quarter of
the northwest quarter, all in Section 33, Town-
ship 13 North, Range 17 E.W.M., and

North half of northeast quarter of the north-
east quarter of the northeast quarter, and south-
east quarter of the northeast quarter of the
northeast quarter, Section 12, Township 14
North, Range 16 E.W.M., and

South half of southeast quarter of southeast

quarter of Section 1, Township 14 North, Range 16 E.W.M.

That said real property is planted to a commercial orchard and the plaintiffs own the crop of fruit now growing thereon.

2.

The defendant is engaged in the business in Yakima County, Washington, of distributing various types of orchard spray, including a spray known as "Elgetol 30." That in the Spring of 1945 the plaintiffs were interested in securing a spray for the control of mildew in the Jonathan, [4] Winesap and Delicious orchards on the above-described property and that in connection therewith the plaintiffs consulted with an officer and agent of said corporation, namely, William S. Regan, chemical and technical adviser of said defendant corporation, and was advised by him that the said Elgetol 30, when properly mixed and applied, would be effective in the control of mildew.

3.

That the plaintiffs were advised by said Regan how to mix said spray and how to apply the same.

4.

That the plaintiffs followed the instructions of said agent of said defendant corporation and mixed and applied said spray as directed by it and that as a result of said application as directed by the defendant corporation, substantially all the blossoms, calyx and apples on the Jonathan orchard and a large portion of the blossoms, calyx and ap-

ples on the Winesap and Delicious orchards located upon the above-described premises, were totally destroyed. The said defendant corporation, its officers and agents, knew or should have known, that such a result would ensue.

5.

By reason of the destruction of said crop the production of said orchard was reduced by more than 18,900 boxes of apples, which would have netted the plaintiffs, over and above all costs of operation, harvesting, packing, etc., not less than \$33,075.00, all to plaintiffs' damage in that amount.

Wherefore, plaintiffs pray for judgment against the defendant for the sum of \$33,075.00, together with their costs and disbursements herein.

BROWN & HAWKINS,

Attorneys for Plaintiffs. [5]

State of Washington,
County of Yakima—ss.

E. A. Emerson, being first duly sworn on oath, deposes and says: That he is one of the plaintiffs above named; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

E. A. EMERSON.

Subscribed and sworn to before me this 29th day of September, 1945.

KENNETH C. HAWKINS,

Notary Public in and for the State of Washington,
residing at Yakima.

[Endorsed]: Filed D. C. Oct. 11, 1945. [6]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

ANSWER

Comes now the defendant and for answer to the plaintiffs' complaint, admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint, this defendant has no information sufficient to form a belief as to the truth and veracity of the allegations therein contained and, therefore, denies the same.

II.

Answering paragraph II of the complaint, the defendant admits that it was in the business of distributing certain orchard sprays in the spring of 1945, including a product known as "Elgetol 30"; otherwise denies each and every allegation of said paragraph.

III.

Answering paragraphs III, IV and V of the complaint, the defendant denies each and every allegation in said paragraphs contained.

By Way of a Further Answer and Affirmative Defense, the defendant alleges: That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant but were caused by reason of the negligence of the plaintiffs themselves proximately contributing thereto in that the plaintiffs failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to [7] give any consideration to the weather conditions when using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dismissed and that it be awarded its costs of suit herein to be taxed.

W. R. McKELVY.

SKEEL, McKELVY, HENKE,
EVERSON & UHLMANN,
Attorneys for Defendant.

Copy received of the foregoing Answer this 6th day of November, 1945.

NAT. U. BROWN and
KENNETH C. HAWKINS.

[Endorsed]: Filed Nov. 13, 1945. [8]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

ANSWER

Comes now the defendant and for answer to the
plaintiffs' complaint, admits, denies and alleges as
follows:

I.

Answering paragraph 1 of the complaint, this
defendant states that it has no information suffi-
cient to form a belief as to the truth and veracity
of the allegations therein contained, and, therefore,
denies the same.

II.

Answering paragraph 2 of the complaint, defend-
ant admits that it was in the business of distrib-
uting certain orchard sprays in the spring of 1945,
including a product known as "Elgetol 30"; other-
wise denies each and every allegation of said para-
graph.

III.

Answering paragraphs 3, 4 and 5 of the complaint, the defendant denies each and every allegation in said paragraphs.

By Way of a Further Answer and Affirmative Defense, the defendant alleges:

I.

That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant, but were caused by reason of the negligence of the [9] plaintiffs themselves proximately contributing thereto in that the plaintiffs failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to give any consideration to the weather conditions when using said product.

By Way of a Further Answer and as a Second Affirmative Defense, the defendant alleges:

I.

That the product "Elgetol 30" referred to in plaintiffs' complaint is a commercial orchard spray product manufactured and packaged by Standard Agricultural Chemicals, Inc., of Hoboken, New Jersey; that said product is distributed and sold to the public in the original package and container as

packaged by the said manufacturer; that the said product is labeled in a conspicuous manner, and said label, among other things, contains the following provision, to-wit:

“Notice: The use of this material being subject to conditions beyond their control, neither the manufacturer nor the seller, make any warranty with respect to results from such use, whether or not such use is in accordance with the directions. The buyer accepts and uses this material subject to these terms and shall not hold either the manufacturer or seller liable for the results of any use of this material.”

That the use of said product by plaintiffs was subject to the foregoing waiver and provision, and said waiver and provision were known to the plaintiffs in using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dismissed and that it be awarded its costs of suit herein to be taxed.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
W. R. McKELVY,
Attorneys for Defendant.

Copy received of the foregoing Answer this 17th day of January, 1946.

NAT. U. BROWN and
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Court No. Civil 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

REPLY

Come now the plaintiffs above named and for
reply to the answer of the defendant admit, deny
and allege as follows:

1.

For reply to the affirmative defense of the defend-
ant plaintiffs deny the same and each and every alle-
gation therein contained.

Wherefore, plaintiffs having fully replied to the
answer of the defendant, pray that the prayer of
their complaint be granted and that judgment be
entered accordingly.

NAT. U. BROWN,
KENNETH C. HAWKINS,
BROWN & HAWKINS,
Attorneys for Plaintiffs.

Filed Nov. 7, 1945. [11]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

REPLY

Come now the plaintiffs above named and for
reply to the answer of the defendant, admit, deny
and allege as follows:

1.

For reply to paragraph 1 of defendant's first
affirmative defense plaintiffs deny each and every
allegation therein contained.

2.

For reply to paragraph I of defendant's second
affirmative defense plaintiffs deny each and every
allegation therein contained.

Wherefore, having fully replied to defendant's
answer plaintiffs pray that the prayer of their com-
plaint be granted.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

STIPULATION

Come now the plaintiffs and the defendant above
named by and through their respective attorneys
and stipulate as follows:

1. Plaintiffs' complaint may be and by this stipu-
lation is hereby amended as follows:

“Paragraph 4a. Plaintiffs gave due notice
to the defendant of the injurious effect of said
Elegtol upon said crops.”

2. Defendant may file herein an amended answer,
a copy of which is attached hereto.

Dated this 3rd day of January, 1946.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Plaintiffs.

W. R. McKELVY,

By A. P. CURRY,

Attorneys for Defendant.

Filed Jan. 24, 1946. [13]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

STIPULATION

Come now the plaintiffs and defendant by and
through their attorneys and stipulate as follows:

1. Plaintiffs' complaint may be and by this stip-
ulation is hereby amended by adding to said com-
plaint the following:

“Paragraph 4a. Plaintiffs gave due notice
to the defendant of the injurious effect of said
Elgetol upon said crops.”

2. The answer of the defendant may be and by
this stipulation is hereby amended as follows:

“Paragraph IV. Answering paragraph 4a
of plaintiffs' complaint as amended defendant
denies each and every allegation in said para-
graph.”

Dated this 23rd day of January, 1946.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

W. R. McKELVY,
By A. P. CURRY,
Attorneys for Defendant.

Filed Jan. 24, 1946. [14]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

AMENDED ANSWER

Comes now the defendant and for answer to the
plaintiffs' complaint, admits, denies and alleges as
follows:

I.

Answering paragraph I of the complaint, this
defendant has no information sufficient to form a
belief as to the truth and veracity of the allegations
therein contained, and, therefore, denies the same.

II.

Answering paragraph II of the complaint, the defendant admits that it was in the business of distributing certain orchard sprays in the spring of 1945, including a product known as "Elgetol 30"; otherwise denies each and every allegation of said paragraph.

III.

Answering paragraphs III, IV and V of the complaint, the defendant denies each and every allegation in said paragraphs contained.

By Way of a Further Answer and Affirmative Defense, the defendant alleges:

I.

That if the plaintiffs sustained any damages to the orchards as alleged or otherwise, the same were caused by reason of no negligence on the part of this defendant, but were caused by reason of the negligence of the plaintiffs themselves proximately contributing thereto in that the plaintiffs [15] failed to use the product complained of in the plaintiffs' complaint in the proper manner and failed to use it properly mixed, made an excessive application of said product, failed to spray at the proper time, and failed to give any consideration to the weather conditions when using said product.

By Way of a Further Answer and as a Second Affirmative Defense, the defendant alleges:

1.

That the product "Elgetol 30" referred to in plaintiffs' complaint is a commercial orchard spray product manufactured and packaged by Standard Agricultural Chemicals, Inc., of Hoboken, New Jersey; that said product is distributed and sold to the public in the original package and container as packaged by the said manufacturer; that the said product is labeled in a conspicuous manner, and said label among other things contains the following provision, to-wit:

"Notice: The use of this material being subject to conditions beyond their control neither the manufacturer nor the seller, make any warranty with respect to results from such use, whether or not such use is in accordance with directions. The buyer accepts and uses this material subject to these terms and shall not hold either the manufacturer or seller liable for the results of any use of this material."

That the use of said product by plaintiffs was subject to the foregoing waiver and provision, and said waiver and provision were known to the plaintiffs in using said product.

Wherefore, having fully answered plaintiffs' complaint, defendant prays that said complaint be dis-

missed and that it be awarded its costs of suit herein to be taxed.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
W. R. McKELVY,
Attorneys for Defendant.

Copy received of the foregoing Answer this 17th day of January, 1946.

NAT. U. BROWN and
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Filed Jan. 29, 1946. [16]

[Title of District Court and Cause.]

REPLY TO DEFENDANT'S AMENDED
ANSWER

Come now the plaintiffs above named and for reply to defendant's amended answer, admit, deny and allege as follows:

1.

For reply to paragraph I of defendant's first affirmative defense, plaintiffs deny each and every allegation therein contained.

2.

For reply to paragraph I of defendant's second affirmative defense plaintiffs deny each and every allegation therein contained.

Wherefore, having fully replied to defendant's amended answer, plaintiffs pray that the prayer of their complaint be granted.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Filed Feb. 6, 1946.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

and

No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

(Consolidated)

RECORD OF PROCEEDINGS AT THE TRIAL

January 27, 1947

Before: Honorable Sam M. Driver,

United States District Judge. [18]

Be It Remembered, that on the 27th day of Jan-
uary, 1947, the above entitled causes, having been
consolidated for the purpose of trial, came regu-
larly on for trial in the above court at Yakima,

Washington, before the Honorable Sam M. Driver, Judge of the above-entitled Court, sitting with a jury; [23]

The plaintiffs appearing by Kenneth C. Hawkins, of Messrs. Brown and Hawkins, Yakima, Washington;

The defendant appearing by W. R. McKelvy and A. P. Curry, of Messrs. Skeel, McKelvy Henke, Evenson and Uhlmann, Seattle, Washington;

Whereupon, the following proceedings were had and done, to-wit:

A jury of twelve was empaneled and sworn to try the case.

The Court: In order that I may not overlook it later, gentlemen of the jury, I will tell you at this time that a trial of this kind proceeds according to well-established rules. The plaintiff puts on his evidence and proof first, and calls his witnesses, and they testify, and then the defendant calls his witnesses and puts on his proof, and if they have any rebuttal the plaintiffs come back in rebuttal, and then the attorneys argue, and the Court gives you his instructions on the law, and then it is submitted to you for finding such facts as are submitted for your determination.

Up to that time, until you actually retire to decide, you should not make up your minds at all, because there is always more coming, so keep an open mind at all times until the case has been finished and submitted to you. You will not be kept together in this case, since [24] it is a civil case,

but I think it is best during the short recesses, the Court usually takes a recess about eleven o'clock, and in mid-afternoon another one, and during those times I think it is best to go to the jury room, and if you want to telephone or have any errands done the bailiff will take care of that. That avoids your circulating about where witnesses may be talking about the case. During noon hour and overnight be sure not to talk to anybody about this case or permit anyone to talk to you about it. Don't discuss it among yourselves. If they start to, just tell them you are on the jury and you can't talk about it, and avoid reading accounts about it in the newspapers and listening to accounts on the radio. Avoid listening to or reading about this particular case, because we want you to get the evidence from the stand and from the court here, and not just some reporter's idea of what it was. You may proceed, gentlemen.

(Whereupon, Mr. Hawkins made an opening statement to the jury on behalf of the plaintiffs.)

Mr. McKelvy: We will reserve our statement, your Honor, until the opening of the defendant's case, if we may.

The Court: All right.

Mr. Hawkins: At this time I would like to call [25] Doctor Regan as an adverse witness.

WILLIAM S. REGAN

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. William S. Regan.

Q. Where do you live, Dr. Regan?

A. I live in Yakima.

Q. How long have you resided in Yakima, sir?

A. Approximately twenty-two years, with the exception of a few years when I went back East.

Q. And with what concern, or by what concern, are you employed?

A. California Spray-Chemical Corporation.

Q. The defendant in this case? A. Yes.

Q. And you are their entomologist, are you not, Doctor? A. Yes.

Q. And you are the chief or head of their field staff here? A. Yes.

Q. And during 1945 you were their agent and representative, were you not? A. Yes.

Q. You were employed by the California Spray-Chemical Company to assist growers in working out their spray programs? [26] A. Yes.

Q. And thereby assisting in the sale of products sold by your company?

A. You might say that.

Q. Yes; and in connection with your work in that regard you edited and published a little pamphlet or newspaper called the "Ortho News"?

A. Yes.

(Testimony of William S. Regan.)

Q. And do you have the copies that I subpoenaed?
A. The copied are there.

(Whereupon, copy of "Ortho News" Volume 17, No. 1, was marked Plaintiff's Exhibit "A" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 2, was marked Plaintiff's Exhibit "B" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 3, was marked Plaintiff's Exhibit "C" for identification.)

(Whereupon, copy of "Ortho News" Volume 17, No. 4, was marked Plaintiff's Exhibit "D" for identification.)

Direct Examination

(Continued)

Q. Dr. Regan, I am handing you Plaintiffs' Identification A. Will you state what that is?

A. Ortho News. [26]

Q. What is the date of that?

A. Volume 17, Number 1, February, 1945.

Q. And that was edited and published by you, and I should say the defendant, California Spray-Chemical Corporation?
A. Yes.

Mr. Hawkins: I will offer Exhibit A in evidence.

Mr. McKelvy: Object to the offer for the reason that it is outside the issues as framed by the pleadings.

(Testimony of William S. Regan.)

The Court: May I see it? Were you through making your objection?

Mr. McKelvy: I think so, yes.

The Court: Objection will be overruled. Admitted.

(Whereupon, Plaintiff's Exhibit A for identification was admitted in evidence.)

Direct Examination

(Continued)

Q. Referring to Plaintiffs' Identification B, will you state what that is, Doctor?

A. This is Ortho News, Volume 17, Number 2, April 17, 1945.

Q. And that was edited and published by yourself? A. That's right.

Mr. Hawkins: I will offer Plaintiffs' Exhibit B in evidence.

Mr. McKelvy: Renew the same objection made.

The Court: I assume that all of these have distinctive matter and directions about this Elgetol involved in this suit?

Mr. Hawkins: That is correct.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit B for identification was admitted in evidence.)

Direct Examination

(Continued)

Q. I am handing you Plaintiffs' Identification C. Will you state what that is?

(Testimony of William S. Regan.)

A. Ortho News, Volume 17, Number 3, May 9, 1945.

Q. And that was edited and published by yourself?
A. Yes.

Mr. Hawkins: I offer Plaintiffs' Identification C in evidence.

Mr. McKelvy: Make the same objection.

The Court: Is that after the purchase of the spray material here, or before?

Mr. Hawkins: I think some of the spray material was purchased after that issue came out. The last one was dated May 9th, isn't that correct? It is my understanding that that was the case.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit C for identification was admitted in evidence.)

Mr. Hawkins: I have no further questions at this time. [28]

Mr. McKelvy: I have no questions at this time, Doctor. You may step down.

(Whereupon, there being no further questions, the witness was excused.)

E. A. EMERSON

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, sir?

A. My name is Elda A. Emerson.

Q. And you are one of the plaintiffs in this action? A. I am.

Q. You and your wife own an orchard in Tieton? A. Yes.

Q. How large is that orchard?

A. Approximately twenty acres.

Q. What is it planted to, sir?

A. It is planted to Delicious, Winesap, and Jonathan apples, and some Bartlett pears.

Q. And some Bartlett pears? A. Yes.

Q. Do you and your wife own an orchard at or near Gromore? A. We do.

Q. And how many acres do you have there?

A. Approximately twenty acres there. [29]

Q. And what is that orchard planted to?

A. It is planted to Delicious, Winesap, and Jonathan apples.

Q. How long have you owned and operated the Tieton orchard?

A. There is a portion of that orchard that I have owned since '41, the spring of '41, and another portion in '42, about half and half; the places lie together.

Q. And how long have you owned the orchard at Gromore?

A. That was purchased in April of 1944.

Q. In April of '44? A. That's right.

The Court: What was that second name, Mr. Hawkins?

Mr. Hawkins: Gromore.

The Court: These places are both in Yakima County?

Mr. Hawkins: Both are in Yakima County. That's right, is it not, Mr. Emerson?

A. That's right.

Q. And you have operated these orchards yourself? A. Yes.

Q. Since you've owned them?

A. That's right.

Q. And what was the condition of the trees on your Tieton place in 1945, the beginning of the year?

A. The trees were fairly—in fairly good condition, thrifty, and nothing to be alarmed about that I could see in any way, except there was some mildew that was showing up, [30] especially in the Jonathans, on the place.

Q. Was the mildew condition such that it would have cut down the crop in 1945? A. No.

Q. But it might have in later years if you didn't take steps? A. It was possible.

Q. Now, what was the—what is the condition of your orchard as to production from year to year?

A. The Tieton orchard has been a fairly consistent bearing orchard. It has been fertilized, properly irrigated, cover crop, mulches, and so forth have been applied to the orchard; the trees are comparatively thrifty, and I would say that it is above average for the valley.

Q. And what would you have to say with respect to the Gromore orchard?

(Testimony of E. A. Emerson.)

A. The Gromore orchard is not located in as quite a good soil; the trees aren't quite as thrifty; there was more sign of mildew, especially on the Jonathans. It hasn't been—I haven't owned the place except since '44, and the fertilizing that I have given it hasn't as yet brought it up to the standard of the Tieton orchard.

Q. It is improving each year, is it?

A. Yes.

Q. Now, how long have you been engaged in orchard work, Mr. Emerson? [31]

A. I worked for Mr. Garretson in the summer of '35, and since that time I have been more or less—I have worked in orchards every year. I run a place for him, so to speak, operated a place for him beginning in '37, and continuing until I bought one of my own, and I've operated mine since.

Q. You have had the active management of an orchard for a period of about ten years?

A. That's right.

Q. Now, what is the normal method of controlling mildew?

A. That's a rather difficult question for me. I have never had very much trouble with mildew until I purchased this Gromore place. The remedy that I had heard of up to that time was the application of lime and sulphur.

Q. Now, did you use Elgetol "30" as a mildew control in 1945? A. Yes.

Q. And had you used any mildew control prior to the year 1945 on either of your places?

(Testimony of E. A. Emerson.)

A. Not really with the intention of trying to control the mildew. I have used some sulphur at times before, as a more or less a precautionary measure to prevent the spread or attack of mildew.

Q. Did you use any mildew spray in 1946, the spring of 1946?

A. Any mildew spray? Yes. [32]

Q. Yes. What did you use that year?

A. I used lime and sulphur.

Q. Did you have a mildew problem at the beginning of '46? A. Yes.

Q. About the same as 1945?

A. Very comparable.

Q. Well, now, in 1945 you testified you used Elgetol "30" as a mildew control. Where did you buy this Elgetol that you used for this mildew control?

A. Most of it was bought from the Yakima Farmers Supply in Yakima. There probably was a portion of it bought from F. H. Cubberly Fruit Company at Tieton.

Q. And where did you get the directions on how to apply that Elgetol?

A. That was obtained from Mr. Regan, Dr. Regan.

Q. The gentleman who was just on the witness stand? A. That's right.

Q. And when did you have your first conversation with him?

A. It must have been about the first of April, 1945.

(Testimony of E. A. Emerson.)

Q. And was that about the time you bought your first Elgetol? A. Yes, for that year.

Q. And how did the conversation take place? Were you down at his office, or what?

A. No, I was at the Yakima Farmers Supply to buy dormant spray, and I had been inquiring about the use of Elgetol [33] as a mildew spray, because I had heard that it was a control for mildew, and the operators of the Farmers Supply Company couldn't give me any recommendation on the use of Elgetol as a mildew spray, and they suggested that I call Dr. Regan and get advice from him.

Q. And you did that?

A. I did that; I called him by telephone from their office.

Q. And what did he have to say?

A. He said that Elgetol "30" was, in his opinion, the thing that was going to help this valley in the way of controlling mildew, and yet not affect the control of the coddling moth problems that we have. I told him what my problems were, and he said that Elgetol "30" was what I should use.

Q. Now, did he give you a formula, or a recipe?

A. Yes, I asked him in what strength, and about the application.

Q. What did he say?

A. He said that I should apply the first application in the pink stage of the trees, in the strength of one and a half pints per one hundred gallons of water, and then I should use a calyx spray later

(Testimony of E. A. Emerson.)

in the strength of one half pint to the one hundred gallons of water.

Q. Now, would you tell the jury what you mean by the pink stage? [34]

A. The pink stage is the stage of the trees when the bloom cluster is just trying or starting to be exposed. The bloom cluster is composed of about five blossoms, and they're in a pod, and are covered over by leaves. The leaves open up and spread away from this bloom cluster, and gradually the bloom pod or cluster will open up, exposing just the pink part of the bloom, and that was the stage that he recommended, that I was advised to spray, when those blooms—before the blooms really opened, but while the pink was yet exposed.

Q. And would you tell the jury what is meant by the calyx stage?

A. The calyx stage of apples is the stage after the bloom has shed, or the petal has dropped from the bloom; the small apple is formed immediately above the petal; there is a kind of husk, a green husk, that is on the end of the so-called apple, that protects the bloom before the bloom is opened. Those husks during the blooming stage is standing out like so, if you will pardon me for using my hands. The apple is above this, is above the bloom, and after the petals have dropped the apple starts growing, and these little husks will start closing up as the apple grows, and the calyx stage of spray is to spray during the time that the petals drop,

(Testimony of E. A. Emerson.)

before the apple grows enough for that calyx end to close up. [35]

Q. And that was the second time that you were to spray, is that right? A. Yes.

Q. At that stage; and did you follow those recommendations?

A. Just as nearly as I could.

Q. And first, with respect to the pink spray, did you spray your orchard in the pink?

A. Yes.

Q. And at what strength?

A. I used a pint and a half to the one hundred gallons of water; pint and a half of Elgetol "30".

Q. And you sprayed both orchards in the pink, is that right?

A. I sprayed the Jonathans on both orchards, yes.

Q. In the pink? A. In the pink.

Q. And what about the other varieties; did you spray them in the pink?

A. Very few trees; I might have, I did, spray a few straggling trees of other varieties, but I was principally interested in the Jonathans, because that was where I saw the most of the mildew.

Q. And what did you notice about your orchard after you had sprayed in the pink?

A. Well, I noticed that there was considerable wilting in the leaves, and also the blooms, the bloom pods, were [36] wilting, turned yellow, and brown; they just didn't look very thrifty. Some of the leaves had turned brown, and even black. Some of

(Testimony of E. A. Emerson.)

them seemed to loosen up, or just stop growing, and the blooms were the same way. The bloom pods showed about the same results, and there was a number of the blooms that didn't open. There was considerable burn or——

Q. Did you contact Dr. Regan after you saw that condition? A. Yes.

Q. And where did you see him?

A. I saw him first at his office.

Q. And what was said there?

A. I told him that I thought that I had quite a little damage from the spray that I applied. This was done, this conversation took place, before I had finished all the pink spray, we were still applying that spray, and he said that he didn't think that I needed to worry about it, but he would come out and see; made an appointment to come to my place and look the situation over, but——

Q. Did he—excuse me, go ahead.

A. ——but he didn't think there would be any need for alarm, and he would advise me to go ahead and finish the application before the trees would get in bloom, because it would be too late to spray at that stage.

Q. Did he come out to your orchards? [37]

A. Yes, he did, after we had finished the spraying, that pink spray. The pink spray I believe required about five or six days to apply, and Dr. Regan did come out immediately after we had finished the pink spray.

(Testimony of E. A. Emerson.)

The Court: The Court will recess for five minutes.

(Short recess.)

(All parties present as before.)

Direct Examination of Mr. E. A. Emerson
(Continued)

Q. I believe you stated that Dr. Regan came out to your orchards directly after the pink spray in 1945. Did he visit both of your orchards?

A. Yes, he did.

Q. In your company? You were with him?

A. Yes; he came first to the Tieton place, where I live.

Q. You looked over the whole orchard, the two of you?

A. Not over the whole orchard, no; we just walked down through a portion of it.

Q. And what did he have to say?

A. On the Tieton place he said that he couldn't see very much to be alarmed about, that in his opinion it was having the desired results.

Q. How did he explain the burn?

A. He said that the Elgetol attacks the mildew similar to a cancer cure attacking a cancer; that it starts eating the mildew, and any portion of the tree or leaves that [38] is affected by mildew will be attacked by the Elgetol, and if the mildew runs into the leaves it naturally will affect those leaves.

Q. That was his explanation? A. Yes.

(Testimony of E. A. Emerson.)

Q. And did he say anything while he was on the Tieton place about using the Elgetol again on the calyx, the second spray?

A. I don't recall if that was mentioned that time or not.

Q. Then you went down to the Gromore place?

A. Yes, the next day.

Q. The next day; and what did Dr. Regan have to say there?

A. He seemed a little surprised that the trees showed as much burn as they did, and made the statement that he thought it was more damage than he had noticed in any orchard up to that time, but that the Elgetol in his opinion had attacked the mildew that was on the trees at the time of its application, and there would be no more danger from any further burn by another application, because the mildew was, in his opinion, taken care of on the exposed parts at the time that the first application was made.

Q. What did he have to say about using Elgetol again in the second spray, in the calyx spray?

A. Well, he said that I should come back with the calyx spray [33] of Elgetol, and therefor catch the new mildew that might show up in the terminal growth of the trees, after the first application.

Q. And did he give you a formula to use at that time?

A. Well, he still recommended the half pint to the one hundred gallons of water.

(Testimony of E. A. Emerson.)

Q. And were you concerned about using the Elgetol on the second spray?

A. Yes, I was; more so after I talked with a number of farmers and various people that had noted the burns.

Mr. McKelvy: Not what somebody else said; pardon the interruption.

The Court: Yes, I'll sustain the objection. Don't say what they told you.

Direct Examination

(Continued)

Q. At any rate, you talked to Dr. Regan again, is that right?

A. Yes; before I put on the calyx spray I did go back and talked with him, and asked him——

Q. Here's the idea. You can repeat what Dr. Regan told you, because he's in effect one of the people involved in this action, but you can't say what someone else, a stranger, had to say, a stranger to this action; so go ahead and say what Dr. Regan told you; that's perfectly admissible.

A. Dr. Regan seemed a little concerned that I was questioning him for the second time about making this calyx [40] application, I thought, and I thought probably it might appear rude myself.

Q. It might appear what? A. Rude.

Q. Rude?

A. Yes, because he said that this Elgetol had been used, he said, "We've Elgetol in the east for six or seven years, and we've used it in the lower

(Testimony of E. A. Emerson.)

valley, and in the Wenatchee Valley, and we wouldn't recommend it if there was any likelihood of damage."

Q. And you then applied the calyx spray, using the Elgetol?

A. Yes, after he told me at that same time that I would be safe to use Elgetol in the strength of up to a pint to the hundred gallons, and I told him that I didn't want to use more than his minimum recommendations of a half pint to the hundred, and that's what I used, a half pint.

Q. Did you spray the other varieties besides the Jonathon?

A. Yes; I also consulted him about Two-Spot Mite that was showing up in especially the Wine-sap, and asked his advice about applying the Elgetol to them, and he said that in his opinion the Elgetol would control the Two-Spot Mite, and he would recommend spraying the whole orchard in the calyx with Elgetol.

Q. And you did that? [41] A. Yes.

Q. The Tieton, as well as the Gromore?

A. Yes, as near as I could. The calyx had closed on a lot of the trees and apples before we completed that spray, but we did start in that spray.

Q. And what happened to your orchard after this Elgetol was sprayed the second time?

A. Well, there was very similar results as was noted in the first spray. A number of the leaves seemed to be burned, wilted, and the apples really stopped growing, I guess. However, that wasn't

(Testimony of E. A. Emerson.)

noticeable for a few days after the application, the growth of the apples, but they didn't seem to have developed any more after the second application, and they turned yellow, the stems turned yellow, and they were very loose on the tree; they were not going to stick.

Q. And did you attempt to contact Dr. Regan again after that time?

A. Yes, I did contact him, but not until after we had started our first cover spray, probably ten days or two weeks after the calyx spray was started, and I did talk with him at his office, and told him that in my opinion the orchard was pretty well ruined, the crop was.

Q. Pretty well what?

A. Ruined, and that when we were applying this first cover [42] spray, the first spray after the calyx had been applied, the pressure from the spray going through the trees was knocking off those apples that were burned or that were loose, and a great lot of those apples were falling off, and I didn't think that there would be enough left on the trees to pay to spray the orchard for the rest of the season. I asked him if he had any recommendation for a material that I could use to take off the rest of the crop so that I could stop the expense of spraying for the rest of the season. He said he had no recommendation except just by picking them off by hand, and we both agreed that that was practically impossible.

Q. In any of your conversations with Dr. Regan

(Testimony of E. A. Emerson.)

did he have anything to say as to whether or not you would have a crop?

A. Yes, he did. At the time that he came to the Gromore place, between the two Elgetol sprays, he made the statement that we always think we're hurt worse than we are, and in his opinion I still had a good crop of apples, but I'd probably saved myself some thinning money by applying this spray.

Q. What was the condition of your orchard in the spring of 1945 as to bloom? Did you have a good bloom that year?

A. Yes, I had a good bud, the prospects were very satisfactory insofar as the prospect for a crop, but the bloom itself, [43] a lot of the blooms didn't open up after the first application was made, and it looked that the crop might not be as heavy as it had before the first application was Elgetol.

Q. Based on your experience in running orchards, and based on what you saw there in the spring of '45, before the first application of Elgetol, what was your opinion as to the character of crop you would have had that year?

Mr. McKelvy: I object to that as speculative and objectionable, calling for an answer that does not lend itself to opinion testimony, and would be speculative.

The Court: Will you read the question, please?

(Whereupon, the reporter read the last previous question.)

(Testimony of E. A. Emerson.)

The Court: I will overrule the objection.

Direct Examination

(Continued)

Q. You may answer.

A. My opinion of the prospect for crop would have been a good average production for the average orchard in this county, which would probably be estimated at up to a thousand boxes per acre, loose boxes.

Q. You have prepared some figures with reference to the Tieton orchard, have you not, Mr. Emerson?

A. Production figures?

Q. Yes. [44] A. Yes, I have.

Q. Going back over the years that you have been on the place?

A. Yes, just for that time.

Q. Now, then, in 1945, what was your actual crop of Jonathans on your Tieton place, in tons?

A. Those figures I don't remember.

Q. Do you have them here, Mr. Emerson?

A. Yes, they are, I believe, in that——

Q. Would you come down and get them, please?

A. I don't recall the question.

Q. The question was the number of tons of Jonathans produced in 1945 on your Tieton place.

A. Thirty-nine ton in '45, of Jonathans.

Q. And how many tons of 'Saps were produced in '45?

A. Forty-six.

Q. Forty-six tons? A. Yes.

Q. And in 1944, how many tons were produced on your Jonathan place, of Jonathans?

(Testimony of E. A. Emerson.)

A. Fifty-eight and a half, approximately.

Q. And how many tons of Winesaps?

A. Fifty-nine.

Q. And in 1943, on your Tieton place, how many tons of Jonathans? [45]

A. Fifty-four.

Q. And how many tons of 'Saps?

The Court: Fifty-four Jonathans, is that?

A. Yes.

Mr. McKelvy: Excuse me, I didn't get the answer there on the Winesaps.

A. And sixty-four of Winesaps.

Q. And in 1946, how many tons of Jonathans?

A. Sixty-six.

Q. And how many of 'Saps?

A. Seventy-nine.

Q. And excluding the year '45, what was your average production over those three years, of Jonathans, on your Tieton place?

A. The average? Well, I think I have that figured somewhere. That's from '43 through '46, excluding '45. I don't recall just what that is, on the average. That's right, that's what we figured the average over those three years was, fifty-nine and a half tons.

Q. Of Jonathans? A. Of Jonathans.

Q. On your Tieton place. And what was the average on your Tieton place of Winesaps?

A. Sixty-seven and one-third.

Q. Tons? [46] A. Tons.

(Testimony of E. A. Emerson.)

Q. And based on that average, and based on the orchard as you saw it in the spring of '45, would you have expected that tonnage in '45?

A. Yes.

Q. Now, then, I believe you testified that your actual Jonathan crop on your Tieton place was thirty-nine tons in 1945? A. That's right.

Q. And your estimate of what it would have been except for the Elgetol was fifty-nine and a half tons? A. That's right.

Q. Or a loss of twenty and a half tons of Jonathans on your Tieton place? A. Yes.

Q. And then on your Winesaps I believe you testified that your estimated crop in '45, except for Elgetol, was sixty-seven and one-third tons?

A. That's right.

Q. And your actual production was forty-six tons, in '45? A. Yes.

Q. Leaving a difference or loss of twenty-one and one-third tons of Winesaps, is that right?

A. That is right.

Q. Now, then, going over to your Gromore place, what was [47] your actual production of Red Delicious in 1945? A. By tons, thirteen.

Q. And in 1944 what was your Red Delicious tonnage? A. Twenty-eight and one-third.

Q. And in 1946 what was your Red Delicious tonnage? A. Thirty-eight tons.

Q. And with reference to the Jonathans on your

(Testimony of E. A. Emerson.)

Gromore place, your actual '45 production was how much? A. It was eighteen tons.

Q. And in 1944 what was your tonnage on Jonathans?

A. One hundred twenty-six and a fraction tons.

Q. One hundred twenty-six. And what was your production in 1946?

A. One hundred eighty-four tons.

Q. Now, going to the Winesaps, your production in 1945 in actual tonnage was what?

A. Sixty-two tons.

Q. And in 1944, what was your tonnage?

A. Eighty-eight and four-tenths.

Q. And in 1946 what was your tonnage?

A. One hundred forty-two.

Q. Now, then, your average yearly production since you have been on the orchard, excluding 1945, on your Gromore ranch, for Red Delicious, was how many tons? A. The average excluding 1945?

Q. Yes. A. Was thirty-three tons.

Mr. McKelvy: Pardon me—is that the average of 1944 and 1946?

Q. Yes. A. That's right.

Q. And your Winesaps on the Gromore orchard?

A. The average was one hundred fifteen tons.

Q. And your Jonathans?

A. One hundred fifty-five tons.

Q. Now, I believe that you testified that your actual production on the Gromore place of Red Delicious in '45 was thirteen tons, is that right?

A. Of Red Delicious? Yes.

(Testimony of E. A. Emerson.)

Q. And your estimated crop production in '45 of Red Delicious was thirty-three tons?

A. That's right.

Q. The difference would be twenty tons. That would be your loss except for the Elgetol—twenty tons?

A. Yes.

Q. And with reference to your Winesaps, I believe you testified that your actual production in 1945 was sixty-two tons, is that right?

A. That's on Gromore; yes, that's right.

Q. And your estimated production was one hundred fifteen tons? [49]

A. That's right.

Q. Or a loss of fifty-three tons?

A. That's right.

Q. And on your Jonathans you testified the actual production was eighteen tons, is that right?

A. That is correct.

Q. And your estimated production was one hundred fifty-five tons, is that right?

A. Yes.

Q. Or a loss of one hundred thirty-seven tons?

A. That's right.

Q. Now, then, referring to your Gromore place, what was the average price that you obtained on your Jonathans in 1945, of the crop that you did produce?

A. On which place?

Q. On the Gromore place.

A. For the Jonathans I got one hundred dollars a ton.

Q. And that included all grades?

(Testimony of E. A. Emerson.)

A. That was orchard run, just as they were picked.

Q. And what was your price on Red Delicious?

A. Orchard run was one hundred six dollars. I did not sell the Red Delicious orchard run; they were sold on a pack-out basis, and the price that I received was one hundred seventeen dollars and fifty cents with the culls out, but there was enough culls in there that brought the average [50] for the entire crop down to one hundred six dollars.

Q. One hundred six dollars? A. Yes.

Q. And on your Winesaps, what was your average price per ton there?

A. Orchard run would have been, or was, one hundred fifteen dollars and fifty cents. They were sold on the same basis as the Red Delicious; they were packed.

Q. And your price for your number ones was higher than one hundred fifteen dollars?

A. I didn't get the question.

Q. And your price for the number one 'Saps was higher than one hundred fifteen dollars?

A. Yes, it was one hundred seventeen dollars and fifty cents.

Q. And your cullage brought the average price down to one hundred fifteen dollars and fifty cents per ton? A. Yes.

Q. Now, with reference to the Tieton orchard, what was your average price in 1945, per ton, on your Jonathan apples?

A. Let's see—well, I think I have that some

(Testimony of E. A. Emerson.)

place. I'll have to refer to my book. They were sold—the Tieton crop was all sold on the same basis, at one hundred seventeen dollars and fifty cents, culls out, and there was a few culls in the Tieton place.

The Court: You're talking about the Jonathans, [51] Mr. Emerson?

A. Yes; all varieties were sold on the same basis, there.

The Court: All varieties?

A. Let's see; on Jonathans the average for orchard run fruit was one hundred thirteen dollars and twenty-five cents.

Q. And what was the average on your Winesaps?

A. It was one hundred sixteen dollars and seventy-five cents.

Q. That's on your Tieton?

A. That's on the Tieton place, yes.

Q. In 1945. Have you attempted to run those figures across, on your sheets there? With reference to your Tieton place you testified you had a loss of Jonathans of twenty and one-half tons.

A. Yes, I have that.

Q. And you testified that the apples that you did sell from that place, orchard run, was one hundred thirteen dollars and twenty-five cents a ton?

A. That is right.

Q. And that would make the loss in figures how much?

A. Well, let's see; it would be two thousand

(Testimony of E. A. Emerson.)

three hundred twenty-one dollars and sixty-three cents, on the Jonathans at the Tieton.

The Court: Will you read that figure again, please?

A. Two thousand three hundred twenty-one dollars and sixty-three cents. [52]

Q. And on your Winesaps?

A. There was, I consider, a twenty-one and a half ton loss at one hundred sixteen dollars and seventy-five cents per ton, would amount to two thousand four hundred ninety dollars and twenty-seven cents.

Q. Now, then, on your Gromore ranch you testified a Red Delicious loss of twenty tons at one hundred six dollars a ton, is that right?

A. Yes.

Q. And that would come to what?

A. That would come to two thousand one hundred twenty dollars.

Q. And with respect to your Winesaps?

A. The Winesaps estimated loss would be fifty-three tons at one hundred fifteen dollars and fifty cents; that amounted to six thousand one hundred twenty-one dollars and fifty cents.

Q. And your Jonathans on your Gromore ranch?

A. Jonathans was a loss of one hundred thirty-seven tons, at one hundred dollars per ton, would be thirteen thousand seven hundred dollars.

Q. Now, these prices that you have given are the fair market values of those crops at maturity?

A.: Well, so far as I know, I could have sold

(Testimony of E. A. Emerson.)

more fruit if I had had it, at those same figures; in fact, I could [53] have sold the Jonathan crop at the same figures that I did the other varieties had I had a full crop, but they were very few apples on the tree, and they were not a very good quality of apple; they were coarser grain, larger, and actually were more culls among them, a higher percentage of culls, than there are on trees that are heavier loaded, and I would have been able to raise that on the Jonathans at Gromore.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. Well, Mr. Emerson, the price of the apples wasn't the profit that you made, was it? It costs something to raise and market these apples, didn't it? A. Yes.

Q. Well, have you any way that you can tell us what the net profit, if any, was on your apples? In other words, you go out and sell a ton of apples, we'll say, in one case, at one hundred fifteen dollars and twenty-five cents. How much of that was profit if any, in that year?

A. Well, that depends on your over-all expense of growing a crop, sure.

Q. Well, what are the expenses? Tell us the expenses of operating to get a ton of apples.

A. I don't believe that you can set a figure as to how much it costs you to grow a ton of apples. You could come [54] nearer telling how much it takes

(Testimony of E. A. Emerson.)

to operate an acre, or a certain number of trees, because you have a certain amount of work to do whether you have any apples on the place at all or not. You might have a big crop one year, and on the same place the next year it might be very light, and you would have your labor and your expenses would be comparable. Naturally, it costs more to grow a big crop.

Q. Pardon me?

A. But you couldn't, or I have never been able to figure out how much it costs to grow a ton of apples. Too many things enter into the picture.

Q. Well, did you figure that you made any net profit in 1945? A. On my whole place, yes.

Q. Couldn't you figure from that on the number of tons of apples about how much profit, if any, you would make on a ton of apples?

A. Well, I haven't.

Q. Well, you have to figure it some way when you make an income tax return to Uncle Sam, I take it.

A. Yes, that's right; I know what my expenses on the entire place was for that year.

Q. Which place?

A. On both places: I know what the entire cost of producing [55] that crop was.

Q. What was it, the entire cost?

A. I probably don't have them in this book. They're in some of the papers that we have here, but I don't happen to have it here.

Q. I see.

(Testimony of E. A. Emerson.)

Mr. Hawkins: I thought it was in that book.

A. I don't think so. Yes; that's right. Would you want this broke down?

Q. If you have it there so you can give it to us, yes.

A. I spent in the year of 1945 for labor, fourteen thousand four hundred fifty nine dollars and twenty two cents. For seed and plants, which consists principally of cover crop seeds, seventy five dollars; supplies, three thousand three hundred ninety one dollars and twelve cents; repair and maintenance, two thousand five hundred forty one dollars and ninety three cents; fertilizers, eight hundred twenty one dollars and seventy five cents; gas and oil, nine hundred forty nine dollars and thirty eight cents; taxes, three hundred two dollars and twenty five cents; insurance, eight hundred eleven dollars and sixty eight cents; interest, three hundred ninety two dollars and fifty cents; water, electricity and telephone, three hundred ninety eight dollars and eighty cents; automobile up-keep, three hundred fifty dollars; travel expenses, [56] four hundred dollars; which makes a total of a little over twenty four thousand dollars.

Mr. Hawkins: You have one other item, don't you?

The Court: Is that both your orchards, or just one of them?

A. Yes, that's both orchards; they're not segregated as to places.

(Testimony of E. A. Emerson.)

Mr. Hawkins: You have one other item there, do you not, depreciation on your buildings?

A. Yes, that was the actual cost of production. Depreciation on farm buildings and farm equipment, one thousand two hundred forty dollars.

Mr. Hawkins: What does that make the total, then?

A. That totals—I'll have to total that. Twenty five thousand ninety eight dollars and sixty three cents.

Q. Now, Mr. Emerson, it didn't cost anything—well, put it this way; you had no cost of operation so far as a tree is concerned that didn't bear any apples; I mean after your last spray—I suppose that's obvious?

A. You say that I didn't have any cost?

Q. Yes, is that right? Suppose you spray in May, and you see it isn't going to bear any crop. You have no further expense of operation?

A. No, I didn't have any trees that I didn't cultivate right on through the season, just as though they had a crop, [57] because they all had a few apples, and you couldn't segregate.

Q. None of the trees absolutely were barren, then? A. No, every tree had an apple.

Q. And naturally, I suppose it would cost more to harvest a big crop than a small one?

A. Yes, it costs some more; however, it costs more per ton, or more per box, to gather a light crop.

Q. Are you able to give us any idea of what

(Testimony of E. A. Emerson.)

profit, if any, there was that year in a ton of apples, we'll say, so far as your places are concerned?

A. Off-hand I couldn't. I could figure that and get it for you. This expense record is for the entire crop, including some pears, the growing of some pears, and I had some income from them.

Q. Did you put the Elgetol on pears?

A. They were sprayed with Elgetol; however, not exactly the same stage as the apples.

Q. What were they, D'Anjous, or Bartletts?

A. They were Bartletts.

Q. How many Elgetol sprays did you put on the pears? A. One.

Q. When?

A. Well, it was the last part of the calyx spray in the apples. [58]

Q. Now, in these conversations you had with Dr. Regan, as I understand it, and I want to be sure that I am correct on it, you say you talked to Dr. Regan before or after you put the pink on?

A. I talked with him by telephone before.

Q. By telephone before? A. Yes.

Q. How long before you applied the pink?

A. I talked with him on or about the first of April.

Q. By telephone?

A. By telephone, and the pink spray was applied, I started the pink spray on the 26th of April, I believe, the 25th or 26th; it would be about three weeks.

(Testimony of E. A. Emerson.)

Q. Were you acquainted with Dr. Regan before that time?

A. I had just seen him; I possibly, I probably, had spoke to him, but I wasn't personally acquainted with him.

Q. You had never discussed any spraying or fruit growing problem with Dr. Regan before this telephone conversation? A. No, I hadn't.

Q. How long had you been operating these orchards you mentioned?

A. I have operated them from the time that I bought them.

Q. When was that?

A. That was in—a portion of the orchard, the Tieton orchard, was bought in '41 or '42, and the Gromore [59] orchard in '44.

Q. Did you and Dr. Regan talk about the advisability of using Elgetol as a chemical thinner?

A. I wasn't interested in chemical thinning.

Q. Did you talk with Dr. Regan about that at any time?

A. I didn't talk with him about it. It might have been mentioned in our conversations, probably was, it probably was mentioned, but as to the details of the conversation, I don't recall, because I wasn't interested in thinning.

Q. Well, as a matter of fact, thinning by hand became something of a problem during the war and the shortage of help, didn't it?

A. It's always a problem.

(Testimony of E. A. Emerson.)

Q. It's always a problem, yes, and it was hard to get help during the war, is that right?

A. Yes.

Q. And when you first heard of Elgetol, didn't you hear that it had been used in the east as a chemical thinner?

A. As to where, I wouldn't know, but I had heard it had been used as a chemical thinner, and had heard it had been used as a dormant spray.

Q. And had you heard that it had checked mildews when being used as a chemical thinner?

A. I supposed that was the way.

Q. Yes, at that time you supposed that was the way? [60]

A. Yes.

Q. Now, you first heard of Elgetol about when?

A. Well, I heard of it some time during the year of '44.

Q. And you used it in '44?

A. Yes, I used some in 1944.

Q. Did you talk with Dr. Regan or any other representative of the California Spray in 1944, about the use of Elgetol?

A. No, I didn't.

Q. What did you use the product for in 1944?

A. I used it primarily for the control of mildew.

Q. And when did you apply it in 1944?

A. That was applied some time during the month of June.

Q. On what varieties?

A. It was applied on Jonathans, Winesaps, and Delicious.

Q. Now, you say some time in the month of

(Testimony of E. A. Emerson.)

June. What state or stage of the tree, or was the tree, at that time?

A. The fruit had set on the tree and was probably an inch to an inch and a half in diameter, apples would be.

Q. And where did you get your directions, or did you just take them from your own experience, as to how you would use it in 1944?

A. Well, I had had no experience with Elgetol up to that date. The instructions that I had on that came to me in a rather round-about way. This material was bought that year from F. H. Cubberly Fruit Company. [61]

Q. That was in 1944? A. In '44.

Q. Yes.

A. And they had recommendations there that was handed to them by someone from the California Spray Company, that was distributing the Elgetol here.

Q. Well, now, may I ask this: Did you, when you applied it in 1944, have in mind mildew entirely?

A. Yes, that was the only reason that I applied it. I had mildew on the tree, and at one of the spray applications, the cover spray we were applying, I mixed a few pints of the Elgetol "30" with the lead spray, and I sprayed several trees with it.

Q. About how many trees did you spray in 1944?

A. Well, that's a general question; I sprayed all that I had on Tieton, or on the Gromore place, before I had finished, but I didn't do that all at

(Testimony of E. A. Emerson.)

one application. I sprayed a few tanks of it on one of the covers, and considered the results, and then I was well enough satisfied with the result that I saw that I used it on the remainder of the orchard in the next application, which was probably two weeks later, ten days or two weeks later.

Q. That is, you were satisfied that it was checking mildew on the trees? [62]

A. Well, I thought it was.

Q. Yes, enough so that you went ahead and used it some more in 1944? A. That's right.

Q. Would it be safe to say that you sprayed as many as 500 trees?

A. I sprayed more than 500.

Q. More than 500. Would you be able to give us any idea of how many trees, or not?

A. Probably a thousand trees.

Q. And did you get good results, so far as checking mildew was concerned, in 1944?

A. The end results wasn't good. Immediately, within a few days, after the application, it appears to be controlling your mildew, or clearing the mildew from the leaves.

Q. Yes; that was in 1944?

A. That's right.

Q. All right; what actually happened in 1944?

A. Well, I got a little burn on some of the leaves; the fruit was not affected by burn, and I don't think that there was an appreciable amount of injury to the foliage on the trees; there was some.

(Testimony of E. A. Emerson.)

Q. There was some injury to the foliage?

A. Yes.

Q. You knew that Elgetol was so-called Dinitro, "DN" did you? [63]

A. Well, that doesn't mean a lot to me.

Q. I see; how long have you worked in sprays?

A. I've worked in spray since '36, '37.

Q. Well, after you got through using Elgetol in 1944, were you satisfied with it? Did you think you has got some good out of it in 1944, or not?

A. Well, I didn't think that I got the results that I needed.

Q. Do you know when and where you first heard of Elgetol? A. I heard of it in 1944.

Q. And where, and from whom, or what source, do you know?

A. I couldn't say the first one that I heard talking of it. I've heard just general.

Q. You didn't hear it from anybody representing California Spray Company, did you?

A. No, not directly.

Q. Matter of fact, it was kind of community talk that this Elgetol was a new product that might be all right, isn't that right?

A. Not exactly.

Q. Well, you say "not exactly". There was considerable community talk about Elgetol, its possibilities? A. Yes.

Q. And you heard that community talk about the possibilities of Elgetol? [64]

A. That's right.

(Testimony of E. A. Emerson.)

Q. You knew Elgetol had not been used here in the Yakima Valley prior to that time?

A. No, I didn't know that.

Q. Well, did you think it had been used? Did you know anyone that had used it?

A. No, I didn't know anyone that had used it, but I didn't know how long it had been used, where it was manufactured, or where it had been used.

Q. I assume you read that horticultural report, that magazine that comes out every year after the annual horticultural meeting?

A. No, I do not always read it.

The Court: This is a good time to recess. We will recess until 1:30, and remember, members of the jury, what I told you about not discussing this case among yourselves or with anyone else during the recess.

(Whereupon, a recess was taken until 1:30 o'clock p.m.)

Yakima, Washington,

January 27, 1947,

1:30 o'clock p. m.

(All parties present as before, and the trial was resumed.)

Cross Examination of E. A. Emerson

(Continued)

Q. Mr. Emerson, I'm not sure you answered just before the [65] recess as to whether you read

(Testimony of E. A. Emerson.)

the booklet put out, called the Proceedings of the Washington State Horticultural Association?

A. I am sure I did not read it accurately; I probably glanced at a part of it.

Q. And the one put out covering the meeting of December, 1944?

A. No, I don't think I read that; I did not read that.

Q. Do you get the copy of the publication?

A. I have gotten one in previous years.

Q. Yes. Did you know that there was some discussion about the use of Elgetol at this 40th annual meeting, held December 4, 5, and 6, 1944, Yakima Horticultural Association? A. No.

Q. You did not know there was?

A. No.

Q. Now, as I understand it, Mr. Emerson, you say that you never did use Elgetol "30" for the purpose of commercial thinning?

A. That's right.

Q. When you used it first, for the use of mildew, in 1944, did you know of any other growers that had used Elgetol for the purpose of controlling mildew?

A. No, not to have the definite knowledge, no.

Q. But you had heard what you called a community rumor, is that right?

A. That is right.

Q. What had you heard in that connection?

A. Well, I had heard that this spray had been used in the valley, or various places, and seemed to

(Testimony of E. A. Emerson.)

be giving good results in the control of mildew, also as a commercial thinner, and I believe that's about all that I heard.

Q. And you had heard that before the time that you used it in 1944? A. Yes.

Q. You had heard that Elgetol "30" had been used for thinning in orchards that were infested with mildew, that they had got practically one hundred per cent control on the mildew by its application in thinning?

A. Yes, I had heard that rumor.

Q. And that's why you used Elgetol "30" is that right?

A. That's one of the reasons.

Q. What are the other reasons?

A. I talked with Cubberley's man, his office man, as to whether he had any knowledge of the use of Elgetol in the control of mildew, and he said that he did not know of it personally, but it was——

Q. May I interrupt you there?

Mr. Hawkins: Just a moment; let the witness answer the question. You're asking for the other reason, and he's giving it to you.

Q. Well, I just want to ask you when it was got this information.

A. That was at the time, or about the time, that I was buying Elgetol in 1944.

Q. Excuse me for interrupting; I just wanted to get the time.

A. Well, the only thing that I was about to say, this office man of Cubberley's told me that this

(Testimony of E. A. Emerson.)

spray, which was Elgetol "30" was recommended for or had been found to be effective in the control of mildew.

Q. Now, you were running these two places you told us about, the Tieton and the Gromore place, in 1943, were you?

A. Not the Gromore place.

Q. You bought it in what year?

A. In '44.

Q. Do you know about its production in '43?

A. Not personally; I know what the owner told me that its average production was, or had been in previous years, but not to my knowledge.

Q. We'll go to the other one, then, that you do know about, the Tieton ranch. What was its production in '43?

A. Do you want them by varieties?

Q. Yes, please, and if it will help any, I'm going to ask [68] you about '42; you can cover them both at the same time.

A. I don't have the production for '42.

Q. I see; then give us '43.

A. In '43 the Jonathan production in '43 was fifty four tons. The Winesaps were sixty four tons.

Q. Did you have any Delicious on that farm?

A. Yes, we had Delicious; however, they're not entered into this case, and I don't have them segregated. I can find that, I believe.

Q. All right, let it go, as long as they're not involved here. Now, during the season of 1944, over what period of time did you apply Elgetol "30"?

(Testimony of E. A. Emerson.)

A. It was during the month of June; some of it was applied probably about the middle of June. Those are approximate dates.

Q. It was during the month of June, was it?

A. It could have extended over into July.

Q. And you got what you considered were satisfactory results by the use of Elgetol "30" in 1944?

A. No, I wouldn't say that they were satisfactory. I did say that there seemed to be some control.

Q. Some mildew control?

A. Some mildew control; there was also some burn, but I wasn't alarmed about it. I couldn't see that there was enough injury to be alarmed about. [69]

Q. Was there some burn of the foliage in 1944?

A. There was some burn of the foliage in 1944.

Q. Well, put it this way. By reason of your experience with it in '44, you want to use it in '45, didn't you?

A. That isn't the reason.

Q. That isn't the reason? Were your Jonathans bothered with mildew quite a bit?

A. There was more or less mildew throughout the Jonathans.

Q. Matter of fact, the season of '45 was a very bad year for mildew, wasn't it, in the Yakima valley?

A. I am not acquainted too much with conditions throughout the valley.

Q. How about your two places there?

A. On the Tieton place the mildew wasn't bad,

(Testimony of E. A. Emerson.)

never has been, but there was some mildew that can be seen, almost any year you can see some sign of mildew. The Gromore place had more mildew.

Q. Worse on Jonathans, ordinarily?

A. It was worse in Jonathans than in other varieties that I have.

Q. Mildew on some occasions, if not checked, will cut down a crop, won't it?

A. I suppose it would.

Q. Well, why do you want to get rid of mildew? Why do you fight it? What's wrong with having mildew? [70]

A. Mildew not only affects the crop that might happen to be on the tree; it affects the growth of the tree, the terminal growth. It also affects the fruit itself, by marking it up, making it a low grade of fruit.

Q. Does it affect the production the following year; let's say if you have mildew bad one season, does it ordinarily cut your crop the next year?

A. Not necessarily.

Q. If it affects the terminal growth it does, I take it?

A. Not necessarily.

Q. What is the terminal growth?

A. The terminal growth is the growth on the end of any limb.

Q. What is the importance of terminal growth, if any?

A. Your tree must have terminal growth if it continues to grow, get larger, spread.

(Testimony of E. A. Emerson.)

Q. It must have terminal growth if it is going to have a crop next year, too, I take it?

A. That isn't necessarily true. The fruit buds will bear for several years after they come on the tree, and those fruit buds would not necessarily be affected by the mildew, but to keep that consistently bearing you must not allow the terminal growth to stop for any appreciable number of years, or it would probably affect the production of those trees in later years.

Q. In other words, if you let mildew grow, it would check [71] the production of that tree in the following year or years, without fighting it at all.

A. In the following years, but not in the following year. I wouldn't say it would affect the growth or production in the following year.

Q. Well, if you have a tree that is affected with mildew, and you don't do anything about it, you usually get pretty bad crop, marked fruit, and shortage of the crop?

A. Well, in extreme cases, yes.

Q. Well, some worse than others, I take it?

A. Sure.

Q. Had you ever sprayed this orchard since you had it, for the mildew, with anything other than Elgetol?

A. I've sprayed with a lime-sulphur in previous years.

Q. And that was to check mildew?

A. It had been applied as a dormant spray, hoping that it would help to control mildew.

(Testimony of E. A. Emerson.)

Q. As I understand it, lime-sulphur is pretty much the old standard treatment of mildew, is that right? A. As I understand it.

Q. Yes. What is wrong with using lime and sulphur to check mildew? Why were you interested in Elgetol or something else besides lime and sulphur?

A. I had codling moth problem, controlling codling moth in these same orchards that there was mildew showing up, and [72] the best recommendations for the control of codling moth is to use a poison spray, such as lead, or priacide, combined with oil, for the purpose of destroying the egg deposit. It is more effective if you use oil, and by using lime and sulphur they tell me that there is danger of getting a burn or damage or injury to the fruit, if the oil is applied too soon after the lime and sulphur.

Q. Well, see if I understand it, now. You mean if you use lime and sulphur you can't follow it up with your oil summer sprays soon enough, is that what you mean? A. That's what I mean.

Q. Without getting damage. If you waited long enough, following lime and sulphur, the season would be over, the crop would be on the tree, is that it?

A. In some cases. There is a difference in the recommendation of the time that should elapse between the lime-sulphur sprays and oil. Some recommend thirty days, which wouldn't be too long. Some recommend even longer, and I'd rather not

(Testimony of E. A. Emerson.)

take the chances of applying the oil if there is danger of burning it.

Q. You do get damage sometimes from lime-sulphur sprays, don't you, Mr. Emerson?

A. Well, I have heard that such things do occur.

Q. And they've used lime-sulphur for a good many years, I believe. Do you have any idea how long they've used it? [73]

A. How long I have used it?

A. No, just generally?

A. No, I have no idea.

Q. It was used when you first got into the orchard business, anyway? A. That's right.

Q. What kind of weather did you have in 1945, about the time you made this second application of Elgetol? A. That I don't remember.

Q. Well, wasn't it a rather cold and wet spring following the application of the calyx spray? You don't have any recollection at all?

A. Well, I know we do have cold periods during about all our spring.

Q. All of your springs—you mean you have cold springs here, or did I misunderstand you?

A. We do have cold springs. We have some nights that are very near down to the freezing point during the spring season.

Q. How about the rain? Was it a rainy season?

A. There was some rain.

Q. And how about the rain right after the application of this calyx spray in 1945?

(Testimony of E. A. Emerson.)

A. That would be hard to say, because we were probably applying that calyx spray for a period of ten days or [74] two weeks from the time we started until it was completed. We probably had any kind of weather during that period.

Q. That was in '45 you were applying that calyx spray for two weeks? A. That's right.

Q. Could you compare the season of '45 with the '44 season?

A. They were similar. The '45 season would probably be wetter in the spring.

Q. Does weather have anything to do with possible or probable damage from the use of sprays?

A. With some sprays I understand that it does have.

Q. For instance, if you use the old stand-by, lime and sulphur, what kind of weather do you prefer to follow your application of that kind of spray?

A. Well, I haven't used it enough to really be able to answer that intelligently. It shouldn't be too hot, I believe.

Q. If it is too hot what happens?

A. You might get burned.

Q. And if you use an oil spray, isn't there danger if it's warm weather and then turns cold and draws the oil into the tree?

A. For some types of oil that is true.

Q. Weather is a factor in connection with the use of spray, isn't it, generally speaking? [75]

(Testimony of E. A. Emerson.)

A. With some sprays it probably is. I'm not familiar with those things; those are all hearsay.

Q. Mr. Emerson, you knew that the use of Elgetol, or Elgetol "30" or "20" was in a—well, it was in an early stage, so far as being used here in the valley was concerned, didn't you, when you used it in 1944 and '45?

A. I knew it was new insofar as I was concerned.

Q. Yes. And didn't you know that it was new so far as the growers generally here in the valley were concerned?

A. No, I did not.

Q. How long had you lived in this valley?

A. I had lived here since '36.

Q. And you have been in the orchard business all that time?

A. Yes, that's true.

Q. Reading the literature, generally, that comes out on the subject, from various sources?

A. Well, I read some.

Q. Well, try to keep yourself up to date, I assume?

A. No, I wouldn't say I do. I'm a very busy farm boy.

Q. You did take time to read some of the things that come out?

A. That's right.

Q. From the state and various other places?

A. Sure.

Q. Did you ever talk with or know any individual grower or [76] growers that used Elgetol before you used it, in 1945?

A. Had I talked with?—

Q. Yes, did you know of any growers that used

(Testimony of E. A. Emerson.)

it, besides yourself, before you started using it in '45?

A. I knew of some that had used it similar to what I had used it, late in the season.

Q. That is, they had used it in 1944?

A. That's right.

Q. And from what you could learn from these growers, did they get good results in 1944?

A. Some got some burn, that they were not really well pleased with the use of it.

Q. I'm not sure I understood—and they were not pleased?

A. Some were not well pleased with the use of it, and some were.

Q. And the ones that were not well pleased with the use of it, was because they had some burns, is that right?

A. That was the complaint they made to me.

Q. And you knew that before you used it at all in 1945, didn't you? A. Yes.

Q. What did you use for mildew, if anything, in 1946? A. I used lime and sulphur.

Q. How many applications? A. One. [77]

Q. When did you apply that?

A. In the pink stage.

Q. Where did you get the information as to how much Elgetol "30" to use in 1944, what mix to mix up?

A. That was given me from the Frank Cubberley office.

(Testimony of E. A. Emerson.)

Q. And you followed that all through the season of '44? A. For the time that I used it.

Q. Yes, a week or two weeks or whatever it was that you used it.

Mr. McKelvy: I think that's all.

Redirect Examination

By Mr. Hawkins:

Q. Mr. Emerson, what was your mildew condition in 1946?

A. Well, I had very similar conditions to what I had in——

Q. In 1945?

A. ——in the earlier season, '45, and '44.

Q. Did the Elgetol that you applied in '45, did that improve the mildew? A. In 1944?

Q. No, the Elgetol that you applied in 1945, could you tell in 1946 whether that application had improved the mildew condition?

A. I couldn't tell that the trees had improved any. In the spring, immediately following the application of the Elgetol, in '44 and even in '45, there seemed to be some improvement in the amount of mildew that was on the trees, [73] for a period of time, probably two or three weeks, but it did show up later in the season, from both cases.

Q. After two or three weeks the mildew reappeared, in both 1944 and 1945?

A. That's right, yes.

Q. Did you get any burn from the lime-sulphur spray in 1946? A. Not any that I noticed.

Q. Did you ever hear of anyone losing a sub-

(Testimony of E. A. Emerson.)

stantial part of his crop as a result of an application of lime-sulphur?

A. It's a rather general question; I don't recall any cases.

Q. I see. When you talked to Dr. Regan between the pink and the calyx spray in 1945, when he was out at your place, did he tell you to watch out for the weather, in any way?

A. No, there was nothing said about the weather at that time.

Q. No; he didn't blame the burn from the first application on the weather, did he?

A. He said that in his opinion that the Elgetol was attacking the mildew, and the mildew was so embedded in the foliage that it was destroying the leaves by destroying the mildew.

Q. The weather played no part in his explanation of what happened? A. No.

Q. I may have asked you this before; did Dr. Regan express any opinion as to the crop that you would have, after that [79] pink spray, when he was out there?

A. He said that in his opinion I had a good crop, and would have to do some thinning, but probably I wouldn't have to do as much thinning as I would have had I not used Elgetol.

Q. He then advised you to proceed with the second Elgetol application? A. Yes.

Q. And you relied on him when you did that?

Mr. McKelvy: Objected to as calling for a conclusion.

(Testimony of E. A. Emerson.)

The Court: Well, I think it is leading; I'll sustain the objection on that ground.

Redirect Examination

(Continued)

Q. Let me put it in another way, if I can. When you put on the second application, why did you do that?

A. Well, I really applied that application because I wanted to control mildew, and I had put on the one application before, I thought maybe I might be getting results from controlling mildew, and I relied entirely on the instructions of Dr. Regan for that, because I would not have used it had I been using my own judgment. I thought there was too much burn in the first application, and I was really afraid to use it.

Q. Going back to a different matter, will you state again [80] what your total expenses of operation were in 1945, total expenses in 1945?

A. Well, I believe I have that. The total expenses for the entire place, for both places, altogether, is twenty five thousand ninety eight dollars and sixty three cents. That includes depreciation.

Q. Now, what additional expense would you have been put to in 1945 had you not used Elgetol, and had a full crop?

A. I would have had some additional expense in thinning, probably a thousand dollars, roughly,

(Testimony of E. A. Emerson.)

would be my guess in the extra expense of thinning, and I would have had some increase in picking.

Q. About how much would that have been?

A. That would have probably run a little over a thousand dollars, figuring on a box basis; maybe twelve hundred dollars.

Q. Twelve hundred dollars?

A. I have an estimate of those that I could give you.

Q. And any other additional expense?

A. There would have been some expense of hauling that fruit.

Q. About how much would that have amounted to?

A. May I refer to notes?

Q. Surely.

A. The extra hauling expense would have run, my estimate is Four hundred thirty nine dollars.

Q. Now, any other expense, additional expense? Would there have been any additional expense in spraying?

A. I don't think there would have been quite as much spraying; I think because of the light crop I probably had to put on an extra spray that I wouldn't have had to had I had a full crop.

Q. Why is that?

A. Well, it sounds silly. When an entire orchard has a full crop of apples you have a smaller percentage of apples that are likely to be attacked by moth or by the worms, the codling moth. If there is a very light crop of apples you will probably have the same number of moth working in the orchard,

(Testimony of E. A. Emerson.)

and there are fewer apples for them to work on, so naturally your percentage in worms runs considerably higher in the light crop. If you have a full crop and control the moth in the first brood, or the first half of the season, and you have a full crop, there isn't so much danger from a very heavy percentage of worms getting into your crop from the second brood of the moth, where if you have a very light crop on those same trees you will have the same number of moths that will get by or come back with the second brood, and then you still have those fewer apples to work on, so your percentage will run considerably higher in the second brood. [82]

Q. So with a light crop your spraying actually cost more than if you had a heavy crop?

A. I wouldn't say that it cost more, but it certainly cost as much.

Q. What about water?

A. Irrigation expenses are all the same, your pruning expenses would all be the same, cultivation, fertilizing, shredding, cover crop, in fact all expenses of growing a crop so far as I can now determine would be the same under either condition, except the thinning of the fruit and the hauling and picking.

Q. I believe you testified on cross-examination that in your calyx spray you hit some of the trees later than the so-called calyx stage, after the calyx had closed?

A. That's right.

Q. Now, what was the effect of the application

(Testimony of E. A. Emerson.)

of Elgetol on those trees as compared with the others?

A. The further advanced the apples were when the calyx spray was applied the less injury was noticed in the trees. That's true with the Delicious on the Tieton place. I had an average crop of Delicious on it, and this Elgetol spray was only applied to that orchard the one time, and that was in the delayed calyx, or it really was the first cover spray after the calyx of the apple had closed.

Q. The weather didn't cause any burn in that orchard? [83]

A. There was no crop damage.

Q. One more matter that we might as well go into if you have it in your book there. Can you tell the jury what you received for your actual 1945 crop?

A. I can give you the receipts by tons of varieties. I don't have a total.

Q. Well, we can get the total, if you can give us the breakdown on that.

A. Do you want that in all varieties, or the ones that are——

Q. Give it to us in all varieties.

A. ——included in this? 1945; I had four tons of McIntosh apples; got four hundred five dollars and thirty four cents per ton, that's orchard run. Delicious, sixty one tons, at one hundred fifteen dollars and twenty five cents per ton. Jonathans, thirty nine tons, at one hundred thirteen dollars and twenty five cents per ton, and Winesaps, forty six tons at one hundred sixteen dollars and seventy

(Testimony of E. A. Emerson.)

five cents per ton; and I had two tons of add varieties at one hundred dollars a ton. Now, that's on the Tieton place.

Q. That's on the Tieton place.

A. Apples on the Gromore was thirteen tons of Red Delicious, at one hundred six dollars per ton; eighteen tons of Jonathans at one hundred dollars per ton; and sixty two tons of Winesaps at one hundred fifteen dollars and fifty [84] cents per ton, on the Growmore place. I don't have the production for pears in this book.

Q. Referring to plaintiff's identification D, have you ever seen that before, or a copy of it?

A. Yes, I think I have; in fact, I'm sure I read this bulletin.

Q. Did you read that before you made your pink application?

Mr. McKelvy: Objected to as leading.

The Court: I'll sustain the objection. You can ask when he saw it.

Redirect Examination

(Continued)

Q. When did you see that?

A. The date I couldn't give, but I received this Ortho News along during that season, and during this last season I received some of them. I was on the mailing list at the time that this would have been mailed out. I read this before all of the mildew spray was applied. I'm not sure that I read it before I started the pink spray.

(Testimony of E. A. Emerson.)

Q. But you did read it before you started the calyx spray?

A. Yes, I read this at the time that it was mailed out to me.

Q. And what is the date on that exhibit?

A. This is April 17, 1945.

Q. And when did you start applying your pink spray?

A. I started in April, about the 26th.

Q. April the 26th? [85] A. Yes.

Q. One further question concerning this explanation that Dr. Regan gave you about the burning of the leaves. What was your observation of the leaves?

A. Well, my observation was that it was not altogether having respect with leaves. It was burning weak leaves and strong leaves very much alike. There were leaves that were being burned that I could see no mildew on, no sign of mildew, but his explanation was that there probably was mildew on those leaves, but it was just not visible.

Mr. Hawkins: You may examine.

Recross-Examination

By Mr. McKelvy:

Q. When did you buy the Elgetol "30" that you were going to use in '45?

A. I bought that at different times.

Q. When did you buy the first that you bought for '45?

A. I believe the first that I bought was on—we

(Testimony of E. A. Emerson.)

have some bills—was on, April, near the first of April, just before dormant spray was applied.

Q. I might give you these, if you want to refresh your recollection, so you can answer my question.

Mr. Hawkins: We can admit those in evidence if you like.

Q. Oh, it doesn't matter. Would you answer my question now?

A. According to this bill the first that I bought was April [86] 2nd.

Q. And then on down the line, different dates?

A. There's one for May 7th; one for April 28th; one for April 11th. I believe that's all that applies to Elgetol.

Q. Now, Mr. Emerson, isn't it a fact that Dr. Regan told you that Elgetol "30" had been used for the purpose of thinning? A. Yes.

Q. In 1944, and that users of the product for thinning had noticed good results on mildew, checking mildew; isn't that what Dr. Regan told you?

A. No, not exactly. He told me that it had been used as a thinner and that it had given practically one hundred per cent control of mildew.

Q. Now, do you remember giving your testimony in a deposition before the court stenographer on the 9th day of March, 1946, in your counsel's office? A. Yes.

Q. I will ask you, referring to page 22 of the transcript of that deposition, if this question and answer was not asked by me and answered by you as follows:

(Testimony of E. A. Emerson.)

“Question: And you were advised or understood from Dr. Regan or others that when it was used for the purpose of thinning they had gotten good results on mildew? Answer: Yes.”

A. That's right.

Q. Now, do I understand you to say that you sprayed your Delicious for the purpose of controlling mildew?

A. As a precaution, really, against mildew.

Q. Didn't have any mildew on the Delicious, did you? A. Well, I—there was some.

Q. That isn't why you sprayed the Delicious with Elgetol, is it? Isn't the reason you sprayed the Delicious, and the thing you told Dr. Regan, is that you wanted to get a chemical thinner to save hand thinning? A. No, that is not true.

Q. I believe you said this morning you weren't troubled to amount to anything with mildew on the Tieton place? A. That's right.

Q. And what you did have there was on the Jons and Winesaps?

A. I said I had more in the Jonathans than in any other variety. There is a little mildew, probably, on all varieties, even the pears.

Q. But you went through the calyx on the Delicious that had very little mildew, if any?

A. That is right.

Q. For the purpose of taking care of mildew with Elgetol, is that right? A. Yes.

Q. Is there such a thing as on and off years with

(Testimony of E. A. Emerson.)

orchards, [88] better crop one year, and off the next year?

A. There's such a thing, yes.

Q. Is that true of the orchards you've just mentioned, the Tieton orchard and the Gromore?

A. I couldn't say about the Gromore. It is not necessarily true of the Tieton orchard. The Gromore orchard has had a good bloom, a good bud crop, each year since I've had it. Some trees, it's true, have more buds some years than they do other, and the Tieton orchard has been a really consistent bearing, or has had a good bloom, for the past several years.

Q. Did you use lime and sulphur to control mildew in '43?

A. I didn't really use it for that, with that specific purpose, for that specific purpose.

Q. But you did use lime and sulphur in '43?

A. I don't know; I may have. I use it some years as a dormant spray. I don't recall whether I did that year or not, but I do some years, and I use oil other years.

Q. You know that orchards do get serious damage various times by the use of various sprays other than Elgetol, isn't that right?

A. Well, I have never seen a case that was exceedingly bad. I have never had a case myself.

Q. You have read and heard about it?

A. I have heard that there's been quite a lot of damage, yes. [89]

Q. For years, is that right?

A. What was the question?

(Testimony of E. A. Emerson.)

Q. Over the past years that's been the history of the thing, isn't that right? A. Yes, I suppose.

Q. Isn't it a fact that you got a better crop in 1946, the year after you used Elgetol "30" you're complaining of, than you ever had on either of those places in their history, so far as you know?

A. On the Tieton place I got a bigger tonnage in '46 than I've ever taken off of it, due to several reasons, I think. I know on the Gromore place I only had the three crops, and it was larger than either of the other two, that's true.

Q. In other words, your answer to my question is "yes"; you got the biggest crop on those places in 1946 since you owned them?

A. Since I owned them, yes.

Mr. McKelvy: That's all.

Redirect Examination

By Mr. Hawkins:

Q. Will you state what those reasons are, Mr. Emerson?

A. Well, the principal reason is that I have been fertilizing very thoroughly, practicing soil conservation practices of mulching, discing in tree prunings, sowing cover crops, and I have improved the fertility of the orchards. [90] I have watched very closely to try to keep them properly irrigated, watered, and I prune very carefully to keep the new growth coming in the trees, which is more consistent bearing than the old wood for year after year crop. They're getting larger; there is more room on them for crops; they're growing, and those,

(Testimony of E. A. Emerson.)

I think, are the reasons, some of the reasons, that they should produce more now than in previous years.

Q. What about this off and on year—was 1945 an “off” year, or an “on” year?

A. I haven't had an off and on year on the—really, on the Tieton place, since I've owned it. I've always had a good bloom every year, and the fruit has set satisfactorily, so I could not say that there is, or was, an off and on year since I have owned that orchard. The Gromore place was likewise well budded the three years that I've had it. It is true that some of the trees were slightly budded, and almost any year there will be some trees that will not be budded as heavily, probably won't have a one hundred per cent crop, but comparing the bud crop in '44 and the bud crop in '45 on both places, there was equally good bud on the Tieton place both years, and there was probably, there was, a more even bud crop on the Gromore place in '45 than in '44. More nearly all the trees were budded. [91]

Mr. McKelvy: That's all.

Mr. Hawkins: I think that's all, Mr. Emerson.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: Your Honor, I have a witness from Wenatchee that I would like to call out of order, if I may.

The Court: All right, you may call him.

E. L. REEVES

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. E. L. Reeves.

Q. E. L. Reeves; and where do you live, sir?

A. Wenatchee, Washington.

Q. How long have you lived there?

A. Lived there since 1927.

Q. And what is your occupation, sir?

A. My occupation is research plant pathologist for the United States Department of Agriculture.

Q. Research plant pathologist?

A. That's right.

Q. And how long have you had that position?

A. Since 1927.

Q. You carry on certain experimental work in Wenatchee, do [92] you? A. Yes.

Q. In the year 1945 did you carry on any experiments with material known as Elgetol?

A. I did, in cooperation with others, at the State Experiment station there.

Q. State Experiment station in Wenatchee?

A. In the Tree Fruit Branch, Experiment Station of the Washington State College.

Q. I see; and what was the nature of those experiments?

A. The nature of the experiments was to try out new materials, and also old materials, to find

(Testimony of E. L. Reeves.)

out the effect on the control of apple powdery mildew.

Q. And you used Elegtol in your 1945 experiments?

A. Yes, we did; we included Elgetol as one of the trial sprays.

Q. And would you describe to the jury of what your experiments with Elgetol consisted; how you went about it?

A. Do you wish particular dates of application, and so forth, or just in general?

Q. Just in general, first.

A. The experiments that dealt with the use of Elgetol were applied as a pink spray only; as a pink and a calyx spray, in two different applications; and in another lot as a calyx spray only. The strength of the solutions varied. [93] The results of the experiments then were taken on the basis of the amount of damage to the tree from the fungus, the mildew fungus, both as it affected the fruit and as it affected the growth of the tree itself, and observations were also made on any injury to the plant that might be attendant with the application of materials.

Q. Now, would you describe to the jury the results you obtained from those experiments?

A. If I might refer to some of the notes we made of our specific results.

Q. Surely.

A. When applied as a pink spray only, at a strength of either one or two pints of Elgetol to

(Testimony of E. L. Reeves.)

one hundred gallons of water, the control of the markings on the fruit was in general equivalent to what we consider the standard lime-sulphur spray application for control of the mildew to be. As for the control of the twig infections, the control of the twig infection was fair to good, but possibly in general it was judged slightly less than lime-sulphur. Where the pink spray only was applied we had only slight to no foliage injury during the '45 season.

Now, where the calyx spray was used, calyx spray of Elgetol was applied, and the calyx sprays were used in the rate of one pint of Elgetol and one and one-third [94] pints of Elgetol per one hundred gallons, where the calyx sprays were used either following a previous application of a pink spray, or where it was applied for the first time as a calyx spray only, the result was that there was moderate to serious injury of the foliage, and there was a variable fruit dropping. There was no definite percentage that I could give you on the amount of fruit dropping, other than that we did not have sufficient fruits that were picked from those particular trees to allow us to take any reasonable percentage figures that would give us decent results. I believe that about covers it.

Q. Now, in experimenting with materials such as Elgetol, how many years should it be experimented with before you know its characteristics?

Mr. McKelvy: I object to that as calling for a

(Testimony of E. L. Reeves.)

conclusion of the witness, and not a subject of expert testimony.

The Court: I'll overrule the objection, if he knows, as an expert.

A. Well, that would be a matter of opinion, and after all, this was only a one-year experiment, and many experiments, I would say that many experiments were not sufficiently conclusive in that one year to be a straight out and out recommendation. How many years I might have had to conduct [95] it would be a matter of opinion that might be debatable.

Q. Well, what I'm getting at is that you would expect to test it for more than one year?

Mr. McKelvy: Objected to as leading.

The Court: Yes, I think it is leading, started out to be.

Direct Examination
(Continued)

Q. Well, let me put it this way, Mr. Reeves. What kind of material is Elgetol?

A. Elgetol is supposed to be a sodium salt of dinitro cresol.

Q. And in testing materials of that character, how many years do you feel is necessary in order to determine its characteristics, if you know?

Mr. McKelvy: I make the same objections. I think it is the same question.

The Court: Well, I'll overrule the objection.

(Testimony of E. L. Reeves.)

Direct Examination

(Continued)

A. Well, again that might be a matter of opinion.

Q. What we want is just your opinion.

A. The point might be answered in this way. In our experimental work we usually like to have more than one year, preferably two or three years of experimental work prior to definite conclusions.

Mr. Hawkins: You may examine. [96]

Cross-Examination

By Mr. McKelvy:

Q. Mr. Reeves, was there any particular reason that Elgetol as a thinner was particularly in demand during the war?

A. Well, yes, that could be a general question; naturally, I had no experiments with chemical thinners at all, but the matter of desirability of decreased labor would be evident, yes.

Q. When did you first do some work with Elgetol, Mr. Reeves?

A. 1944 was the first year that I worked with Elgetol.

Q. And as I understand it, Elgetol had been used in the east for some years?

A. I have read accounts of their use there for many years, in the 39's and early 40's.

Q. I didn't hear the last.

A. Their use in the east has been in the late 39's and early 40's.

Q. Yes. What type of experiments did you make in 1944 with Elgetol?

(Testimony of E. L. Reeves.)

A. In 1944 I also had cooperative experiments with the other investigators in the tree fruit branch experiment station at Wenatchee. Some of the other workers had applied Elgetol as a chemical thinner for apple trees, on a group of trees, and shortly after, within a period of about three days, I believe it was, three or four days after the material was applied as a chemical thinner it was [97] brought to my attention, or I was asked to look at the trees that had been sprayed, for the purpose of determining whether mildew that had been affected by the application of that spray material during blossom period. I did so, and found that the mildew had been quite effectively stopped by the use of the spray material, therefore I included those particular sprayed trees, or eight of the particular sprayed trees, sprayed during the blossom time, I grouped them in a special block and carried through the observations on those trees that I would ordinarily apply to my other mildew plots.

Q. What did you learn; how did they come out, in other words?

A. That has been published in the proceedings of the 1940 Annual Meeting of the Washington State Horticultural Association.

Q. Yes?

A. And the results were rather good. In fact, we stated in there that while the mildew development on the test trees was rather advanced at the time of the spray application, an appreciable per-

(Testimony of E. L. Reeves.)

centage of the fruit was prevented from becoming marked by mildew, as will be noted by the results shown in the following table 5, and table 5, the results obtained were that where Elgetol—the Elgetol sprayed trees had 43/10 per cent of the fruit seriously [98] marked, that is where over twenty per cent of the fruit surface was marked, 4.3 per cent of the fruit on the sprayed trees were marked, and 17 per cent of the fruit on the unsprayed trees were seriously marked, so as a comparison there, the effectiveness was fairly good; in fact, we considered it reasonably good, with that late spray application, since the application was made from five to six days later than we would prefer to have a powdery mildew spray applied, so we considered the experiment fairly satisfactory, the observations fairly good, rather.

Q. By that do you mean five to six days later than the late full bloom?

A. No, what I mean is this, that we ordinarily apply, or desire to apply, our first mildew spray at the free bloom or pink stage, or possibly even slightly before, in order to obtain the best control. In this particular instance it was applied five to six days after that pink stage, in other words, at the full bloom time, so considering the lateness of the time at which it was applied, we considered the mildew was fairly well stopped for that period.

Q. I believe you reported in the State Horticultural publication you have already mentioned that Elgetol was at least as satisfactory, if not more so,

(Testimony of E. L. Reeves.)

than lime-sulphur, so [99] far as results obtained, isn't that right?

A. Yes, I believe the particular sentence there was "Considering the advanced mildew development at the time of the spray application, the degree of control obtained is in the general range of what might be expected with a lime-sulphur spray applied under similar conditions."

Q. Now, what advantage was there, other than that, so far as the summer sprays are concerned, in using Elgetol instead of lime-sulphur?

A. That comes back to the basic reason for the experiment. The basic reason we were experimenting to find new materials was to find a material which could be safely followed by an oil spray application. We considered Elgetol was a possibility in that direction; that's the reason we were using it.

Q. What is a fungicide, Mr. Reeves?

A. A fungicide is a material that will kill a fungus.

Q. And mildew is a fungus?

A. Mildew is a fungus.

Q. What would you say as to whether or not, in your findings, Elgetol is a good fungicide?

A. I found it to be a good fungicide.

Mr. McKelvy: That's all.

Redirect Examination

By Mr. Hawkins:

Q. Dr. Reeves, or Mr. Reeves, in the 1944 tests

(Testimony of E. L. Reeves.)

the Elgetol [100] was applied at full bloom, is that not right?

A. That is right, and as I stated in the first place, it was not included in our original plans for the experiment; it was taken into the experiment only after others had started.

Q. And this article that counsel has referred to is based upon observations of the use of Elgetol applied at the full bloom stage, is that right?

A. That's right; in 1944 there was only the full bloom stage application.

Q. It was not based upon the application of the Elgetol on the calyx? A. No, it was not.

Q. And as I understand your results in 1945, the damage occurred when the calyx was sprayed?

A. Yes, there was moderate to serious damage to the foliage, and variable dropping of the fruit, when the material was applied in the calyx during the 1945 tests.

Q. So far as you know, Elgetol was not used as a calyx spray in 1944?

A. Well, at least I didn't use it in any of my tests. I have no knowledge of whether it was used by anyone else as a calyx spray.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all. [101]

Mr. Hawkins: I wonder if Mr. Reeves could be excused at this time?

Mr. McKelvy: We have no objection, your Honor.

(Testimony of E. L. Reeves.)

The Court: You may be finally excused then, Mr. Reeves.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: I wonder if I might recall Dr. Regan at this time for some further questions?

The Court: All right.

WILLIAM S. REGAN

recalled as a witness on behalf of the plaintiffs,
testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Dr. Regan, as I understand it, you are an agent and representative of the defendant corporation, and are head of their field staff, is that not right?

A. I haven't any such title; I am rated as entomologist.

Q. You are employed as an entomologist, is that right? A. Yes.

Q. Do you have any individuals working with you?

A. Working with me, but not necessarily under my supervision after they get their initial experience.

Q. How many other men work with you in your work?

A. During the war there were practically two

(Testimony of William S. Regan.)

men, including myself, and normally we would be having five or six. The [102] result was that two of us were trying to carry on just too much work. Ordinarily we carry on experiments before the materials go into the field. During the war it was absolutely impossible to do it with our force.

Q. Now, you had two other men, or just one other man, besides yourself?

A. Well, there's you might say only one other man in this general area.

Q. In 1945?

A. In 1945, another man who had to cover 'way down into Idaho and up into the Ellensburg country.

Q. When did you first start selling Elgetol in the Yakima valley?

A. In '44, according to my recollections.

Q. And it was sold as a dormant spray?

A. No, it was sold both as a dormant spray and as a bloom thinning spray.

Q. The spray is manufactured as a dormant spray, for the purpose of dormant spray, isn't it?

A. Yes, but you will probably note that the experimenters, the State and Federal men in the east, started using it for bloom thinning.

Q. Well, now, that was one of the reasons you brought in here in 1944?

A. That's right. [103]

Q. Was to try to do something with this bloom thinning problem. Did you run any experiments yourself in connection with bloom thinning?

(Testimony of William S. Regan.)

A. We carried on a very few experiments, and that was purely what you might call grower experiments; where we didn't have the man force to do the work we would give the material to a grower and supervise the job, and then make checks.

Q. You did not experiment on your own property? A. None.

Q. Does the California Spray-Chemical Company own any experimental tracts?

A. Not in this area.

Q. Not in the Yakima valley? A. No.

Q. And what experimental work you do is through the grower?

A. Not at the present time. We've gone back to doing our own experimental work, now that we have the help to do it.

Q. What do you mean by doing it yourself?

A. We take block tests, and put on the applications, or under our direct supervision, where everything is very thoroughly checked.

Q. Do you lease property from some other grower?

A. No; as a matter of fact growers are quite glad to give us part of the orchard to do that. [104]

Q. I see; they turn it over to you and you go ahead and handle the spray program for the year, is that right? A. That's right.

Q. And you put your own men in there now?

A. No, we have some of the men, and the grower's men assist, and as I say, they're very glad to cooperate.

(Testimony of William S. Regan.)

Q. And where the grower does it, you check from time to time and not take his word for it?

A. No; we don't take his word for it.

Q. You can see that yourself; that's what you're doing at the present time? A. That's true.

Q. In 1944 and 1945 you were not doing that yourself?

A. We were not doing it ourselves; we were getting the growers to put on the material, furnishing the material and then checking.

Q. How many experiments did you make in 1944?

A. I would say very few, when you have only two men covering a big territory.

Q. I appreciate that, but would it be two, or ten experiments, or what?

A. Well, it would probably not be more than three or four.

Q. And the Elgetol at that time was applied at full bloom, is that not right?

A. No; as a matter of fact there are quite a number of [105] growers that started in full bloom and sprayed for two weeks, right through the calyx spray.

Q. In 1944 there was little or no damage from the use of Elgetol, is that right?

A. There was very little damage. There may have been an occasional case where some foliage burn occurred, but it was considered in most cases non-commercial.

(Testimony of William S. Regan.)

Q. On the other hand, in 1945 there was quite a bit of damage done throughout the valley?

A. That is true.

Q. In 1944 the spray was not used as a mildew control, was it? That is, it was not first applied for that purpose?

A. No, it was not, primarily, but the growers who observed its action were very much impressed by the effect on mildew, and practically every grower who used it for bloom thinning went back to use it for mildew control in 1945, upon their own observations.

Q. Now, in 1945, you recommend it be applied in the pink and in the calyx?

A. That was not necessarily our recommendation. That's a standard recommendation for the application of mildew sprays, in the pink and—

Q. Well, you referred to that in Exhibit B, I believe. Let's see, I am reading from plaintiff's Exhibit B, the issue of April 17, 1945, of the Ortho News: "Mildew has [106] been severe during the past several years on Jonathans and some other varieties of apples, with some cases of severe injury to D'Anjou and Bartlett Pears and to some varieties of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulphur (2 gallons or more in 100) in the "pink," with follow-up sprays of Wettable Sulfur for calyx or later sprays, if necessary." In other words, the standard or customary time to apply lime-sulphur is in the pink and in the calyx?

(Testimony of William S. Regan.)

A. And possibly follow-up sprays.

Q. "To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of mildew and can be followed by Summer Oil in the usual ten-day interval. Suggested dosage—(1) Elgetol $1\frac{1}{2}$ pints in 100 gallons of water in the "pink," when buds are separated in clusters and before the bloom opens, and (2) Elgetol $\frac{1}{2}$ pint in 100 with 3 pounds of Lead Arsenate, in the calyx spray. Note. Be sure the Elgetol is stirred thoroughly in its container before removing the proper dosage. Careful, thorough spraying, with special attention to infected tip growth is essential for Mildew control." Now, in that issue, you did state that the time to spray was the pink and the calyx stages, isn't that right?

A. That was the standard recommendation.

Q. Yes, and that's what you were making for the Elgetol? A. Yes.

Q. Well, now, in 1944, you had no experience with the application of Elgetol in the pink and in the calyx, did you?

A. I don't recall, unless it's some of our actual work.

Q. Well, you don't recall any now?

A. I can't without checking my records.

Q. And in 1945, however, that was the recommended procedure for the application of Elgetol as mildew control? A. That was the suggested.

Q. Yes. Now, I wonder if you would explain

(Testimony of William S. Regan.)

to the jury the theory behind bloom thinning, that is, why you apply your Elgetol at full bloom in order to effect bloom thinning?

A. I might qualify your statement a little bit by saying that it is not always recommended in the full bloom. It may be a delayed full bloom, or when quite a few of the petals are off, which is practically a calyx spray. The theory of bloom thinning by chemical means, and we will say with Elgetol, is that the central element of the bloom is the largest, most vigorous element of the bloom cluster. You might say that the one in the center is the king bloom, and around that are four or five other buds that come out and open up; the bloom opens perhaps one [108] or two days after the central, or king, bloom, it is called. The theory of the bloom thinning is to be certain that the king or central bloom has set; providing you have good weather, pollination has occurred, that is, bees, the various forms of insects that carry pollen; the theory is that the king bloom sets first, and in each cluster, of course, is a king bloom, probably every three or four inches along the branches, smaller branches, and the aim is to have the central bloom, the most vigorous bud, set and develop fruit, and when the petals fall off of that, and the others are still open, the idea is to destroy the rest of the bloom in that cluster so that they will not produce fruit. That is the theory of bloom thinning.

Q. In other words, you wait until the king bloom has set, and then you burn off the other buds?

(Testimony of William S. Regan.)

A. Yes, but we have been—if you look into the literature on bloom thinning, you will find that in case of certain varieties, or if there is any doubt about the king bloom setting, to wait for quite a while, to be sure that you aren't taking your crop.

Q. In other words, you have to be pretty careful with this particular type of spraying?

A. I don't think there is anybody who ever had a thing to do with it who isn't certain of that. [109]

Q. Isn't certain of that? A. Yes.

Q. And the danger, of course, is that you may apply the spray material at too early a stage, and kill your king bloom along with everything else, and then not have a crop?

A. That is possible.

Q. How long, or how many years, does it take to test a material such Elgetol?

Mr. McKelvy: I am objecting to this as outside the issues. I don't believe there is any claim here along this line, in the complaint. It seems to me it is going beyond the issues.

The Court: I'll overrule the objection, if he's able to answer.

A. Please repeat.

Q. I will re-state the question. How many years does it take, in testing a material such as Elgetol, to determine its characteristics?

A. Well, I don't think that was fully a question in this particular case.

Q. I beg pardon?

(Testimony of William S. Regan.)

A. That was not fully a question; nobody stated that exhaustive tests had been carried on.

Q. I agree with you there, one hundred per cent, but what I [110] am getting at is, normally, how long would you expect to test a material?

A. Well, I have an idea it would vary considerably with different types.

Q. In the case of Elgetol it would take several years, three or four years, maybe five years?

A. That might be true, but——

Q. So that you would get a full cycle of weather?

A. Possibly, but growers were of this disposition: The fact was that labor was very scarce during the war; many growers were forced to thin when the fruit was almost ready to harvest. If they could go in with bloom thinning, knowing its hazards, which I think most of them did, they were willing to take the chance and get that early thinning which would not only thin the fruit at a reasonable cost, but detract the vigor into the following crop.

Q. Now, as I understand it, Doctor, you never did really recommend Elgetol for a chemical thinner, did you?

A. Oh, I think so. That is, at least it was mentioned.

Q. Well, didn't you say in one of these issues that Elgetol as a chemical thinner was still uncertain, or something to that effect?

A. Well, you can go back east after ten years

(Testimony of William S. Regan.)

use, and they will still tell you that it is in that questionable stage under certain conditions. [111]

Q. In the May 9th issue of *Ortho News*, Plaintiffs' Exhibit C, under the heading "Other Benefits Possible With Elgetol" (3) "Bloom Thinning—while many growers have reported good results with Elgetol for 'chemical thinning' at bloom time, there are so many variables which might affect results that growers should be well informed of possible hazards before attempting this practice." That was what you stated in that particular issue?

A. That's what they'll still state, back east, after ten years of use.

Q. But you nevertheless told the grower that he had a choice of either lime and sulphur or Elgetol, when no work had been done on the use of Elgetol in the calyx stage, isn't that right, Doctor?

A. We did not tell anybody that there had been exhaustive work; we told them it had been used the year before.

Q. Here's what you said, "The grower also has the choice of Elgetol;" he can use either lime and sulphur or Elgetol, and you stated that at a time when neither you nor anyone else had done any experimental work with Elgetol applied in the calyx stage?

Mr. McKelvy: That's objectionable. The exhibits are in evidence. Counsel now reads from the exhibits and argues them. I object to the question as argumentative. [112]

The Court: I'll permit him to answer.

(Testimony of William S. Regan.)

A. I made the statement a few minutes ago that growers had started in the full bloom and carried it through the calyx spray. That's calyx spray, isn't it?

Q. Also the experimental work?

A. We based these statements on grower use, observations, and the fact that practically every grower who used it the year before came back and used it the following year.

Q. Now, when you do experimental work, you'll take a block of trees here and give it the proposed new treatment, and then you'll take another block of trees adjacent to it and give it the standard treatment, and compare the two; that's the only way you can test anything, isn't that right?

A. Well, I don't think so.

Q. That's one good way.

A. You can test the material—after many years use of lime-sulphur, somebody ought to have a good idea what it will do.

Q. But when it's never been used, I don't see how you can properly tell, Doctor.

A. Yes, but it had been used.

Q. The only experience you had was in the year 1944, when some grower sprayed from full bloom through the calyx, and it was no test block. [113]

A. Yes, but those growers were all satisfied, and came back to use it.

The Court: Wasn't he asked if there was any blocked out?

Mr. McKelvy: The last two weren't questions.

The Court: Read the question.

(Testimony of William S. Regan.)

(Whereupon, the reporter read the last previous question.)

A. We had no test blocks, according to my recollection.

Q. That's right.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all, Doctor.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The Court will recess for ten minutes.

(Short recess.)

W. A. LUCE

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. W. A. Luce.

Q. And where do you live, Mr. Luce?

A. Yakima.

Q. And how long have you lived in Yakima?

A. Approximately five years. [114]

Q. And what is your occupation, sir?

A. Extension Agent in Horticulture for the county and State College.

Q. And what is the nature of your work?

(Testimony of W. A. Luce.)

A. It is an educational service to the farmers of Yakima County.

Q. You consult with the growers on their various problems? A. Yes.

Q. Including their spray problems?

A. Yes.

Q. Have you ever heard of the material called Elgetol? A. Yes.

Q. When did you—first, what is Elgetol?

A. Well, I don't think you want the technical description of it, or the scientific description of it, do you?

Q. Well, its a so called dinitro material?

A. It is a dinitro material that has been used in various ways for spraying in the orchards.

Q. It was originally designed as a dormant spray? A. I think you're right, yes.

Q. And when did you first hear of Elgetol, Mr. Luce? A. Oh, approximately 1943 or 1944.

Q. And what was Elgetol used for in 1944?

A. Well, it had been used in the dormants as an aphid egg control, but we had heard about it being used as a blossom [115] spray in the east, so a few growers, I think it was in '43 or '44, tried it out as a blossom spray on some of the heavier blooming varieties, such as Yellow Newtown and Transparents.

Q. Did you inspect any of these orchards that had been chemically thinned with Elgetol?

A. Yes.

(Testimony of W. A. Luce.)

Q. Did you observe any Jonathan orchards so sprayed? A. No.

Q. Or Roman Beauties? A. No.

Q. Or Winesaps?

A. Yes, I saw some Winesaps.

Q. And did you observe the effect that that spray had with respect to mildew?

A. Mildew in the orchards, especially on Yellow Transparents, had been absent; we therefore assumed that it had been a good control for mildew.

Q. Now, in 1945, Elgetol was used definitely as a mildew control by some growers here in the valley? A. Yes.

Q. And did you have occasion to examine any of these orchards? A. Yes.

Q. And what results did you observe?

A. Well, it varied from complete destruction of the crop [116] with no apparent effect on the mildew, to all degrees in that; no injury whatever, perhaps.

Q. And in 1945, the application was in the pink and in the calyx, is that right, for mildew control?

A. There was no recommendation that I know of for application in the pink. The general recommendations that the county and the State College and State department put out did not recommend it in the pink. It was only as a last resort, about May 6th, I think it was, to be exact, that the recommendation or the suggestion was made that Elgetol be tried, because sulphur at that period, when it had not been used in the pink, would probably be disas-

(Testimony of W. A. Luce.)

trous. It was the last resort to try to check the mildew infestation.

Q. Now, lime-sulphur is the standard method for controlling mildew? A. Yes.

Q. Has been for a number of years?

A. A long time.

Q. And what is the customary time of application of the lime and sulphur spray?

A. The general recommendation is to apply a two per cent lime-sulphur in the pink stage, that is, just before any bloom shows, but after the blossom parts have separated. Following that, ordinarily, a calyx application combined [117] with the lead arsenate is recommended.

Q. Does this lime-sulphur spray burn the crop?

A. Very often does, yes.

Q. Very often does; is it a serious burn?

A. It can be. I've seen crops that have been reduced considerably, but in most cases the injury is restricted to the weaker bloom, and when it is put on as a pink spray it seems to have a hardening effect, so by calyx time the injury is much less severe, except in perhaps the case of the Stayman, which is much more susceptible to sulphur injury. You have to start the application in the pre-pink in order to harden it off.

Q. Now, with reference to this dinitro spray, or any new spray, for that matter, how long does it take, if you know, to test such a material and determine its characteristics?

A. Well, I don't believe anybody could answer

(Testimony of W. A. Luce.)

that so it would be of any value here. Ordinarily we feel that at least three to five years is necessary to give us a good idea of what a material is worth.

Q. And so far as you know, Elgetol was not used in the Yakima valley prior to '44?

A. There might have been some in '43, but I couldn't say definitely.

Q. And so far as you know there was no application prior to [118] '45 in the pink and in the calyx?

A. Not to my knowledge.

Mr. Hawkins: That's all; you may examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Luce, what is your connection, may I ask, with the county?

A. I am considered an associate extension agent.

Q. I see; and employed and paid by whom?

A. Well, it's a three-way proposition, federal money, state money and county money.

Q. And you have no connection with California Spray-Chemical Company?

A. None whatever.

Q. Now, you have already mentioned in your direct testimony that some suggestion or recommendation was made about using Elgetol in the calyx spray in '45. Was that published?

A. Yes.

Q. And it was prepared by yourself and who else, if anyone else?

A. That is a joint report put out by the county

(Testimony of W. A. Luce.)

extension service, United States Department of Agriculture, Bureau of Entomology and Plant Quarantine, and the State Department of Agriculture.

Q. And that was yourself and Mr. Carver, was it? [119] A. Mr. Carver and Mr. Newcomber.

Q. Prepared this article as a joint proposition?

A. Right.

(Whereupon, page 6 of Yakima Morning Herald for Sunday, May 6, 1945, was marked Defendant's Exhibit No. 1 for identification.)

(Whereupon, page 10 of Yakima Morning Herald for Sunday, April 15, 1945, was marked Defendant's Exhibit No. 2 for identification.)

Cross Examination

(Continued)

Q. Referring, Mr. Luce, to defendant's exhibits 1 and 2 for identification, these are obviously a part of a newspaper? A. This one comes first.

Q. Yes, I guess we marked them backwards. 2 comes before 1. Would you just tell us what it is, please?

A. This column "Fruit Spray Information" is prepared especially for the Sunday Herald.

Q. And published in what edition?

A. Oh, it is published in the Sunday edition; also goes to the county newspapers. The radio also has it.

Q. And the date there, I believe, shows Sunday— A. April 15, 1945.

(Testimony of W. A. Luce.)

Q. Now, the article under "Fruit Spray Information" is that one of the articles you have just referred to as being prepared jointly by you and the other two men? [120] A. Yes.

Q. Now, as to number 1, tell us what that is, please.

A. This is the May 6th issue, about three weeks later; same origin, put out in the same way to the same sources.

Q. And another article under the "Fruit Spray Information"? A. That's right.

Q. That article is prepared in the same manner you referred to defendant's exhibit 2?

A. Right.

Mr. McKelvy: I am offering defendant's 1 and 2 in evidence.

Mr. Hawkins: We object to those, your Honor. In the first place, there is no evidence that they were brought home to the plaintiffs' knowledge; secondly, there is no proper foundation laid for these items. The only possible purpose would be for the purpose of impeaching this witness, and so far as I know there have been no contradictory statements made; no proper foundation whatever for admitting those in evidence as exhibits.

The Court: May I see them, please? Objection overruled. They will be admitted in connection with the cross-examination.

Mr. Hawkins: I beg pardon?

The Court: I say, the objection will be over-

(Testimony of W. A. Luce.)

ruled; they will be admitted in connection with the cross-examination [121] of this witness.

(Whereupon, Defendant's Exhibit No. 1 for identification was admitted in evidence.)

(Whereupon, Defendant's Exhibit No. 2 for identification was admitted in evidence.)

Cross-Examination

(Continued)

Q. As I understand it, the control of mildew in '44 was so good where Elgetol "30" was used that it was considered as very satisfactory for mildew control, as a fungicide?

A. I wouldn't express it just that way. Where Elgetol was used as a blossom spray there was little evidence of mildew development. It had not been put on as a control measure.

Q. But what I was getting at, isn't it a fact that the control of mildew then was so good that from then on it was considered as such? In all fairness to you, I'm reading from one of your answers to a question.

A. Yes, that's correct.

Q. That is correct?

A. I would go further than that. I would say that early in 1945 we suggested to the Prosser Experiment Station that they run a few preliminary tests, because the pressure was so great from the growers' standpoint to use it that we wanted more information, and they tried it in the pink on Jonathans at Prosser without any injury whatsoever,

(Testimony of W. A. Luce.)

and that led us to believe that under the critical condition at calyx spray time, that perhaps that was the last resort to use it, and that's why this suggestion was made in the May 6th issue.

Q. What do you refer to when you say that grower pressure was so great to use the product? What do you mean?

A. Well, through the telephone, and personal call items that come to both Mr. Newcomber and myself, we can judge pretty well what the thinking of the grower is at the time we were putting out those bulletins, and there was very definite interest and demand to know what to do.

Q. Now, in '45, as you say, you had some trouble with Elgetol? I don't mean you did, but the growers that you watched did, is that right?

A. Yes.

Q. How do you account for that trouble that the growers had?

A. Well, personally, I think it was principally due to the weakened condition of the trees that were sprayed, I know that mildewed foliage is weaker than normal foliage. In the second place, the moisture at the time of the spray was unusual, due to unseasonable rains, and the Elgetol practically became a weed killer in that sense. That's my personal version of the injury.

Q. I will ask you if the following question and answer was given, Mr. Luce, at the time you testified in the former [123] trial in the state court, I think that was about April, 1946. 1946, that's

(Testimony of W. A. Luce.)

right; by way of refreshing your recollection: "Question: Yes, and there was some trouble in 1945? Answer: The trouble came principally through the failure of the growers to get on their mildew spray properly; it might be a case of water, it might be a case of they just didn't observe the infestation soon enough." Do you remember giving that answer, is that correct, Mr. Luce?

A. Many growers, it's the human condition, I suppose, they delay it, hoping there wouldn't be a bad mildew year. It is the same every year. Growers will delay to see if there is going to be an infestation before they actually get busy and spray, and if they get beyond the pink stage then they're in trouble. It was on that basis that this suggestion was made in that column.

Q. Do you remember the weather conditions that spring; anything particularly about the weather, or not?

A. I have mentioned that we had a rain about calyx spray time, which was not normal for that period.

Q. From what you know, or knew, of Elgetol "30" and its history in this valley, and its history in the east, I will ask you whether or not Dr. Regan and the other agents of the California Spray-Chemical Company should have reasonably anticipated any serious injury from the [124] use of this product in 1945?

A. I don't think there was anybody that could

(Testimony of W. A. Luce.)

have anticipated the injury that was coming up. I probably talked to everybody that I could find or talk to that did know anything about it, and they couldn't anticipate a thing, but it happened, which is the thing that usually happens when we use some untried material.

Q. Did you have a report on its use in New York or back east?

A. Yes, we had had reports, but they had been on the basis of blossom thinning, and not as mildew sprays.

Q. Do they have mildew in the east, particularly?

A. Not to the point that we do here, no, from what Dr. Boetcher has told me.

Q. I guess what somebody else would tell you would be improper under our rules of evidence. That would be hearsay, you see.

A. All right.

Mr. McKelvy: I think that's all.

Redirect Examination

By Mr. Hawkins:

Q. Mr. Luce, with reference to this testimony that counsel just read, I thought I would read the full report here that you made. This is a question by Mr. McKelvy:

“Question: What did you particularly observe in 1944, first?

“Answer: It wasn't used as a mildew

(Testimony of W. A. Luce.)

spray. It [125] was used probably as a thinning spray, but the control of mildew was so good that from then on it was considered as such.

“Question: Considered as a good spray for mildew?

“Answer: Yes, and we still don’t know what the characteristics of Elgetol were in all respects, as you will notice from these articles.

“Question: Yes; then there was some trouble in 1945?

“Answer: The trouble came probably——”

Mr. McKelvy: Principally.

Mr. Hawkins: “The trouble came probably——”

Mr. McKelvy: It is certified principally.

Mr. Hawkins: Well, this is the report that was made right at the time. (Continuing):

“The trouble came probably through the failure of the growers to get on their mildew spray properly; it might be a case of water, it might be a case of they just didn’t observe the infestation soon enough. Many calls were coming to our office for help, and that is the only reason, you will note, it was suggested for control. It was not recommended. It was just something pulled out of the bag to help the

A. That’s right. [126]
growers.”

(Testimony of W. A. Luce.)

Recross-Examination

By Mr. McKelvy:

Q. The next question:

“Question: Mr. Luce, from what you know of Elgetol “30” and its history in the Yakima valley, I will ask you whether or not Dr. Regan and other agents of the defendant here, the California Spray-Chemical Corporation, should have reasonably anticipated any serious injury from the use of this product, Elgetol “30”?”

“Answer: Not to my knowledge; that was not the history of the use of Elgetol up to that period.”

You answered that at that time?

A. Uh huh.

Mr. McKelvy: That’s all.

Redirect Examination

By Mr. Hawkins:

Q. You also testified at that time that from three to five years was necessary in order to determine the characteristics of this material, isn’t that right?

The Court: Perhaps you had better take the stand again.

Q. The question was: you also testified at that time that it took from three to five years testing in order to determine the characteristics of a material such as Elgetol?

(Testimony of W. A. Luce.)

Mr. McKelvy: I don't think he did.

Mr. Hawkins: Oh, yes, he did. Let me examine that.

Redirect Examination

(Continued)

“Question: Do you think one year's experimentation is sufficient to determine the characteristics of a spray such as Elgetol, Mr. Luce?

“Answer: That's not enough for any material.”

That was your testimony, wasn't it? I believe that was your testimony at that time, is that not right?

A. I didn't get the reading.

“Question: Do you think one year's experimentation is sufficient to determine the characteristics of a spray such as Elgetol, Mr. Luce?

“Answer: That's not enough for any material.”

A. That's right.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all, Mr. Luce.

(Whereupon, there being no further questions, the witness was excused.)

Mr. McKelvy: I wonder if we might read defendant's Exhibits 1 and 2 to the jury now?

The Court: Yes, if you wish.

Mr. Hawkins: I suggest that counsel confine the reading just to this article, and not the whole paper.

Mr. McKelvy: I won't read about Gardener's Nursery. The jury can get the benefit of the two year old newspaper. [128]

The Court: I assume the exhibit includes only the article?

Mr. McKelvy: Yes, that's the idea. I refer first to the first, by date, although it is the defendant's Exhibit 2, merely because I handed them wrong to the clerk.

Mr. Hawkins: I wonder if Mr. Luce can be excused at this time?

Mr. McKelvy: He's excused now. He's subpoenaed by the defendant, but I have told him he didn't need to be here today.

The Court: Mr. Luce may be excused.

(Whereupon, Mr. McKelvy read to the Court and the jury the article headed "Fruit Spray Information" in Defendant's Exhibit 2, and the article headed "Fruit Spray Information" in Defendant's Exhibit 1.)

Mr. McKelvy: Thank you, your Honor.

The Court: Call your next witness.

Mr. Hawkins: At this time I will call Mr. Stahler.

H. K. STAHLER

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please? [129]

A. H. K. Stahler.

Q. And where do you live, Mr. Stahler?

A. Two miles this side of Naches.

Q. Beg pardon?

A. Naches, Washington.

Q. And what is your occupation?

A. Fruit grower.

Q. How long have you been engaged in that occupation? A. Since 1913.

Q. 1913? A. Yes, sir.

Q. Have you had any experience with apples during that time? A. Some.

Q. In fact, most of the time you have worked on apples?

A. Apples and pears, all the time.

Q. Do you operate an orchard at the present time, Mr. Stahler? A. Yes, sir.

Q. Where is that located?

A. Two miles east of Naches city.

Q. And how many acres do you have in this orchard? A. About 85 acres.

Q. Eighty five acres; and in 1945 you had the management of this same orchard? A. Yes.

Q. And for how many years prior to that did

(Testimony of H. K. Stahler.)

you have management [130] of this particular orchard? A. I went up there in '42.

Q. You went up there in '42; and who is the owner of this orchard? A. J. D. Keck.

Q. And what sort of an arrangement do you have with him concerning the operation of the orchard?

A. Well, I get part of the crop, on a crop basis.

Q. And he gets part of the crop, is that right?

A. Yes.

Q. On a percentage basis; and what expenses do you pay?

A. I pay all the labor and I own all the machinery.

Q. And you own all the machinery?

A. Except the spray rig.

Q. Except the spray rig; that is, you furnish all the machinery except the spray rig?

A. Yes, sir.

Q. And Mr. Keck buys the materials?

A. He buys the material.

Q. What kind of apples do you have on this orchard, Mr. Stahler?

A. Jonathans, Winesaps, and Romes.

Q. Jonathans, Winesaps, and Romes?

A. Yes.

Q. What kind of Romes? [131]

A. Standard Romes.

Q. And what is the condition of the trees on your orchard?

A. Well, they're in pretty good shape.

(Testimony of H. K. Stahler.)

Q. Are they young trees or old trees?

A. In the neighborhood of twenty five or twenty seven years old.

Q. Are they good bearing trees?

A. Yes, sir.

Q. Do you have any mildew in your orchard?

A. Quite a little.

Q. How long have you had that condition?

A. Well, it's been there since I've been there.

Q. Since '42? A. Since '42.

Q. And how do you attempt to control the mildew in your orchard?

A. Well, we didn't start it until '45.

Q. I beg your pardon?

A. We didn't try any control until '45.

Q. Until '45, and what did you use in 1945?

A. Elgetol.

Q. Did you use anything in '46? A. Yes.

Q. What did you use in 1946?

A. Lime and sulphur. [132]

Q. In connection with your use of Elgetol in 1945, at what time of the season did you apply it?

A. The first in the pink stage, and later in the calyx.

Q. In what strength of application did you make?

A. We used seven pints to a six hundred gallon tank.

Q. In both applications? A. Yes.

Q. When did you first hear of Elgetol?

A. In '44.

(Testimony of H. K. Stahler.)

Q. From whom did you hear about it?

A. Dr. Regan.

Q. How long have you known Dr. Regan?

A. Oh, I think since '42 or '43; I don't know just when.

Q. He was the field man out in your neighborhood?

A. Yes, for the Ortho.

Q. Representing the California Spray-Chemical Company?

A. Yes, sir.

Q. And did he work out a spray program for you?

A. Yes, sir.

Q. He's done that each year, is that right?

A. Yes.

Q. With respect to the year 1945, what conversation did you have with Dr. Regan concerning your spray program?

A. You mean all of it?

Q. No, in connection with your Elgetol; did he work out a [133] program for you?

A. Yeh, he said to spray in the pink and again in the calyx.

Q. When he first talked to you about Elgetol in 1944 what did he say?

A. He said where they had sprayed with it for a thinner they had good results with mildew.

Q. And did he recommend that you use this product in '45?

A. Yes, sir.

(Whereupon, blank Spray Record Chart with writing on the reverse side thereof was marked Plaintiffs' Exhibit "F" for identification.)

(Testimony of H. K. Stahler.)

Q. Handing you Plaintiff's Identification F, will you state what that is?

A. That is a spray schedule that Dr. Regan gave me.

Q. A spray schedule that Dr. Regan gave you?

A. Yes.

Q. Is that in his handwriting?

A. Yes, sir.

Q. And on the second sheet, what is that?

A. Well, that's—he told me to spray again.

Mr. Hawkins: I will offer Plaintiffs' Exhibit F in evidence. By the way, did you receive copies of the Ortho News in '45? A. No, I didn't.

Mr. McKelvy: Is this marked one exhibit, or two? [134]

Mr. Hawkins: It's just one exhibit.

Mr. McKelvy: We object, then, necessarily. Certainly we don't believe that that second sheet has anything to do with this case, at least it doesn't show at this time that it has. We think the entire exhibit is immaterial and does not go to the issues in this case, incompetent and irrelevant.

Mr. Hawkins: Testimony is that the first page is the formula that Dr. Regan gave Mr. Stahler with respect to the application of Elgetol as a mil-dew control. The second page Mr. Stahler testified was a note left for him by Dr. Regan, telling him to put the spray on again.

Mr. McKelvy: The point of my objection is that the second page has nothing to do with the first

(Testimony of H. K. Stahler.)

page, and as the record stands, it wouldn't be admissible.

The Court: There's nothing in the record to show the dates of these two sheets, is there, or the relationship in time of one to the other?

Direct Examination

(Continued)

Q. Can you state when the first sheet of the plaintiffs' identification F was given to you?

A. I can't exactly, no.

Q. About when was it delivered to you?

The Court: Speak up just a little louder, Mr. Stahler. I doubt if all the jurors can hear you.

A. That would be some time around—well, I don't know just when the pink spray was that year.

Q. With respect to the pink spray, when was that first sheet given to you?

A. About three or four days before the pink spray.

Q. And when was the second sheet given to you?

A. Well, I don't think the second sheet goes with the first sheet.

Q. I see. Do you know when it was given to you? A. It was later in the season.

Q. Later in the season? A. Yes, sir.

Q. I understood your testimony was that the second sheet was a note left by Dr. Regan telling you to put the spray on again.

A. Not the Elgetol; this is a different spray entirely.

(Testimony of H. K. Stahler.)

The Court: I think you had better separate them, counsel, and mark them separately.

(Whereupon, note written on the reverse side of a Spray Record Chart was marked Plaintiffs' Exhibit "G" for identification.)

Mr. Hawkins: At this time we will offer plaintiffs' Identification F in evidence.

Mr. McKelvy: No objection.

The Court: It will be admitted. [136]

(Whereupon, Plaintiffs' Exhibit "F" for identification was admitted in evidence.)

Mr. Hawkins: May I read this to the jury at this time?

The Court: "F"? Yes.

(Whereupon, Mr. Hawkins read Plaintiffs' Exhibit "F" to the Court and jury.)

Direct Examination

(Continued)

Q. Now, did you follow those directions of Dr. Regan's in applying the Elgetol?

A. Yes, sir.

Q. What effect did you notice—first, on what varieties did you apply the Elgetol?

A. Jonathans and Romes.

Q. And what effect did you notice after the pink spray?

A. After the pink spray we only got a slight burn on what we thought was the affected mildew.

(Testimony of H. K. Stahler.)

Q. Did you talk to Dr. Regan between the pink and the calyx sprays?

A. I think I did. I don't remember, now.

Q. Do you recall what he said?

A. No, I don't.

Q. Did you spray again in the calyx with the Elgetol? A. Yes, sir.

Q. And what varieties did you hit that time?

A. The same, Jonathans and Romes.

Q. How about the Winesaps?

A. They was sprayed in full bloom, what I sprayed there.

Q. I beg pardon?

A. The Winesaps were sprayed for a thinner.

Q. They were sprayed for a thinner?

A. Yes.

Q. And what effect did you notice after you sprayed the Jonathans and Romes in the calyx?

A. They kept getting a little worse every day.

Q. What do you mean by that?

A. Well, they kept getting a little—looked as though they were drying up, and the Jonathans all disappeared.

Q. Did the leaves turn brown? A. Yes.

Q. And what happened to the stems of the apples?

A. They turned yellow, and the apples dropped off.

Q. Were there any apples left on your Jonathan orchard?

(Testimony of H. K. Stahler.)

A. Oh, there might have been a box on the whole orchard; a few here and there.

Q. Did you continue to spray and cultivate the Jonathan orchard?

A. Not after that, no.

Q. What crop did you harvest from the Jonathan orchard that year? [138]

A. Not any.

Q. Not any? A. Not any.

Q. You continued to irrigate that orchard, however?

A. Oh, yes.

Q. And to cultivate it?

A. You have to take care of them.

Q. But you did not spray it any further that year, and of course you had no picking expense that year, on the Jonathan orchard?

A. No.

Q. Now, with respect to your Rome orchard, what did you notice after the Elgetol spray in the calyx?

A. Just about the same as the Jonathan.

Q. You noticed the leaves turning brown?

A. Yes.

Q. And what did you notice about the stems of the apples?

A. They turned yellow, and most of the apples dropped off of those, but not quite as many.

Q. Not as many, but almost all of them?

A. Pretty near.

Q. And with respect to the Winesaps, what did you notice after you sprayed them with the Elgetol?

A. Well, they did the same thing; they just

(Testimony of H. K. Stahler.)

about didn't have any on. Picking time, the pickers wouldn't pick [139] them.

Q. You harvested some Winesaps, however, that year? A. Yes, some.

Q. And did you continue to spray your Romes and your Winesaps?

A. Yes, the Winesaps and Romes we sprayed the rest of the season.

Q. And you continued to water and cultivate those orchards? A. Yes.

Q. How long did you say you have been on this particular orchard, Mr. Stahler?

A. Since '42.

Q. Since 1942; and you have observed the blooms each year, have you not? A. Oh, yes.

Q. And what would you say with respect to the blooms that you had in 1945?

A. Well, outside of the Jonathans, I had a good bloom in 1945.

Q. You had a good bloom in 1945?

A. Yes, sir.

Q. What about your Jon bloom, was that a good bloom? A. No, that was about half.

Q. About half; and that was before the application of the Elgetol? [140] A. Yes, sir.

Q. Now, do you have an off and on year upon your orchard?

A. Well, you might call it that. There's off and on years in all orchards, I guess.

Q. And was 1945 and off or an on year?

A. Should have been an on year.

(Testimony of H. K. Stahler.)

Q. Should have been an on year?

A. Yes.

Q. That is to say, 1944 was a light crop?

A. Yes, sir.

Q. Now, let's assume that you had not used Elgetol in 1945, and had a good crop; would you have had any additional expense over and above the expense that you did have?

A. Yes, we would have had some thinning expense and picking expense, and hauling expense, that you wouldn't have without any crop.

Q. And you would have had some spraying expense on your Jonathans?

A. And some spraying.

Q. Now, can you estimate for us what that picking expense would have been, that extra picking expense?

A. Well, I figured we lost about five thousand boxes of Jonathans, and it was ten cents a box.

Q. And how many boxes of Romes would you estimate that you lost? [141]

A. About the same.

Q. And Winesaps?

A. About five thousand.

Q. Those are loose boxes?

A. Loose boxes, yes.

Q. And what would it have cost you to have picked those additional boxes?

A. Well, that would be in the neighborhood of fifteen hundred dollars.

(Testimony of H. K. Stahler.)

Q. And how much extra would it have cost you to haul those boxes?

A. Well, yard them out, and up to the warehouse, about three cents a box.

Q. About three cents a box; fifteen thousand boxes would be four hundred and fifty dollars?

A. Uh huh.

Q. And what would it have cost you to thin, on account of that extra crop, or lost crop, I should say?

A. Well, that year they were getting from a dollar to a dollar and a half a tree, so I don't know; five or six hundred dollars.

Q. Five or six hundred dollars. That would total up about twenty five hundred dollars in extra expense, so far as labor is concerned, is that right?

A. Something like that. [142]

Q. How do you arrive at your loss of five thousand boxes of Jons, five thousand boxes of Romes, and five thousand boxes of Winesaps?

A. Well, that's an estimate of what the place had bore before.

Q. And the condition of the orchard that it was in that spring? A. Yes.

Q. What about your mildew condition? Was that reaching a point where it would have reduced your crop? A. Yes, it would.

Q. And you have taken that into consideration in estimating this loss? A. Yes.

Q. What was the weather like in the spring of 1945, if you remember?

(Testimony of H. K. Stahler.)

A. It was rather wet.

Q. Did Dr. Reagan advise you to watch out for the wet weather in applying this Elgetol?

A. No, sir.

Q. Mr. Keck handles the selling of the crop, is that right? A. Yes.

Q. And he pays for the spray materials?

A. Yes, sir.

Q. In connection with the spraying, there would be some [143] labor involved there. On your Jonathan crop how many spraying programs or schedules did you omit by virtue of the fact that you lost your entire crop? A. Oh, I think three.

Q. And how many days, ordinarily, did it take for each spray application?

A. About two days with four men.

Q. I beg pardon?

A. Two days, with four men.

Q. Two days for four men; and how much were you paying the men at that time?

A. Eighty five cents an hour.

Q. Eighty five cents an hour; that would be on a ten hour basis? A. Yes.

Mr. Hawkins: I think that's all; you may cross examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Stahler, as understand it, you used Elgetol in '45 because Dr. Regan told you that some growers in the valley had used it as a thinner in

(Testimony of H. K. Stahler.)

1944 and that it had controlled mildew, incident to using it as a thinner; is that right, about, or not?

A. That's right.

Q. Regan told you that it had been used as a thinner, [144] apparently satisfactory to some growers in the valley in '44? A. Correct.

Q. He did not tell you that it had been used in the pink or in the calyx in '44, did he, Mr. Stahler? A. No.

Q. Now, I'm not sure that I have heard, maybe these questions may be repitious, but I did not understand whether you sprayed your Winesaps just once, or twice? A. Just once.

Q. With Elgetol? A. Yes.

Q. And that was put on primarily for thinner?

A. Yes, sir.

Q. And where along the line did you apply it? What was the stage of the tree when you put that on? A. Practically full bloom.

Q. Practically full bloom? A. Yes, sir.

Q. Some of the petals were dropping, then, I suppose, or not? A. Just started.

Q. Just starting to drop. Did you have a mildew problem on the Winesaps?

A. Well, not that I know of, on the Winesaps.

Q. And were the Winesaps as bad where you used it as a thinner? Did you get as much damage as you did on Romes or Jons?

A. It didn't seem to be much different.

Q. On the Romes and the Jonathans you used it in the pink and the calyx? A. Yes.

(Testimony of H. K. Stahler.)

Q. The Winesaps just as a thinner, in full bloom, damage about the same on all of them, is that right? A. Yes, sir.

Q. The full bloom is where, compared to the calyx, and how far apart would they be, normally?

A. Well, that would depend on the season, but mostly about ten days.

Q. The full bloom would be about ten days before the calyx, is that right? A. Yes.

Q. Average about that? A. Uh huh.

Q. I believe you said your orchard was about twenty five years old, is that right? Trees about twenty five years old?

A. About that, the most of them, yes. That's a guess with me; I don't know for sure.

Q. Had you known of any grower in the valley that had used [146] Elgetol in 1944 as a thinner, and was satisfied? I mean you, yourself, know of any individual? A. Yes, one.

Q. Was that Mr. Rowe? A. Yes, sir.

Q. He had given a speech, I believe, or a talk, at the meeting of the Horticultural Association in December here in Yakima, hadn't he?

A. Yes, sir.

Q. On the use of Elgetol. Were you there and heard the speech? A. Yes, sir.

Q. Mr. Rowe is a grower in what part of the valley?

A. Well, he's just a——

Q. I mean where is he located?

(Testimony of H. K. Stahler.)

A. He's just on the river, between the upper and the lower Naches valley.

Q. And you heard him make this talk that was later reported in the magazine? A. Yes, sir.

Q. About his experience with Elgetol in '44, is that correct? A. Yes, sir.

Q. And you learned from that source that having used it as a thinner it had also controlled mildew?

A. Yes, sir. [147]

Q. So far as his orchards were concerned, is that correct? A. Yes, sir.

Q. And you were getting to the place there in the orchard where you almost had to do something about the mildew, as far as the Jonathans were concerned, weren't you? A. Yes.

Q. And lime-sulphur would interfere with your summer sprays; is that the reason you didn't want to use it? A. Correct.

Q. Is that correct? A. That's correct.

Q. Did Dr. Regan suggest to you some time during the season that you spray just a couple of rows of the Winesaps, and see how they would do, and then hold it a little bit before you sprayed—remember that?

A. No. He didn't suggest that to me.

Q. Referring to the Winesaps only?

A. Well, the Winesaps there, he told me to spray two rows alongside of the Jonathans, to protect from mildew, yes.

Q. Why did he say to spray the two rows, do you know?

(Testimony of H. K. Stahler.)

A. Well, he thought there would be more mildew on the two rows alongside of the Jonathans than there would be somewhere else.

Q. Did he suggest that you wait and see how you came along with these two rows? [148]

A. No.

Q. You did at that time know that Elgetol was in the experimental stage, so far as using it for mildew control was concerned, didn't you?

A. I knew it was new in the valley.

Q. Pardon me?

A. Yes, I knew it was new in the valley, yes sir.

Q. And you knew that it had been used as a thinner and had in those cases cleaned up the mildew?

A. That's what I had heard.

Q. Nobody had ever told you that it had been used in the pink and calyx before?

A. No.

Q. You assumed that using the Elgetol as you did on the varieties you mentioned was experimental so far as using Elgetol was concerned, didn't you, Mr. Stahler?

A. Well, no; not in my case. I didn't suppose it was experimental.

Q. I mean—not in what case, did you say?

A. I didn't suppose I was experimenting with it when I did it, no.

Q. Well, you remember when I took your deposition March 9, 1946, in Mr. Hawkins' office?

A. Yes, sir.

Q. Before a court reporter. I find these ques-

(Testimony of H. K. Stahler.)

tions and [149] answers on page 16 of the transcript. I guess I'll have to get a start here: (Reads from page 15)

“Question: Did he” (referring to Dr. Regan) “ever tell you that Elgetol 30 had been used solely for mildew control?”

Answer: No.

Question: He told you, I believe, that they had hoped it would work out, because it had got results on mildew when they used it as a thinner, is that right?

Answer: Yes, sir.”

That's correct so far?

A. That's correct.

“Question: You understood that it was in the experimental stage insofar as using it for mildew alone was concerned?

Answer: Well, he claimed it had been used for mildew before, but I never saw it.

Question: You mean it had been used as a thinner?

Answer: As a thinner, yes, and had cleaned up the mildew.

Question: But so far as using it in the pink and the calyx, for the purpose of mildew only, you knew that was experimental?

Answer: Well, I suppose it was. He didn't say [150] so, but I suppose it was.

Question: You assumed it was at that time, I take it?

Answer: Yes.”

(Testimony of H. K. Stahler.)

Q. You remember those questions and answers?

A. Yes, I remember those.

Q. And they are correct?

A. I guess they are.

Q. Did you, at Dr. Regan's suggestion or on your own, spray some D'Anjou pears? A. Yes, sir.

Q. And what spray did you put on the D'Anjous?

A. That was a pink spray.

Q. A pink spray? A. Yes, sir.

Q. And a Calyx later? A. No.

Q. And why did you apply the spray to the pears?

A. The same reason, mildew.

Q. And when did you put them on the pears?

A. That was when they were in the pink.

Q. In the pink; is that about the same time as apples? A. No, it's a little sooner.

Q. What kind of results did you get so far as the pears were concerned? [151]

A. We got good results.

Q. You mean that the Elgetol cleaned up the mildew? A. Most of it.

Q. Had you seen the results on your D'Anjou pears before you started using Elgetol on the apples?

A. Well, the pink spray on the apples didn't seem to do much damage.

Q. But what I mean is this: I may be wrong, but didn't you spray the pears long enough that you could see that it was cleaning up the mildew on the pears, before you started spraying any apples, any variety?

(Testimony of H. K. Stahler.)

A. Well, the mildew on pears doesn't show up very good, and you can't see very much until later in the season.

Q. Were you satisfied with the Elgetol spraying on the pears when you started spraying the apples?

A. Yes, sir.

Q. And you say the pink spray on the apples did no harm? A. Didn't seem to.

Q. It was the calyx spray that caused the trouble, is that it? A. Yes, sir.

Q. And what kind of weather did you have following the calyx spray?

A. Well, it was pretty wet.

Q. Pretty wet? [152]

A. Rainy weather.

Q. The Elgetol cleaned up the mildew so that you got a pretty good crop in '46, didn't you, Mr. Stahler?

A. It cleaned up what was in sight, but every time it rains mildew comes back.

Q. Did you get a good crop on these orchards in '46? A. Yes.

Q. An extra good crop?

A. Not as large as I had before.

Q. Pardon me?

A. Not as many apples as I had before.

Q. Let's see, you had it since '42?

A. Yes.

Q. The orchard's in good shape now?

A. Pretty good shape now.

Q. I wasn't just sure how you figured these five

(Testimony of H. K. Stahler.)

thousand boxes. Why did you say ten cents a box? How do you arrive at that?

A. That was for picking.

Q. Oh, I see. I didn't understand that; and did you place an average on your production before 1945, or take any certain year? How do you arrive at those figures?

A. Well, it's—I don't know, you just kind of get used to it after while, estimating a crop.

Q. You get used to estimating what should have been or what [153] you hope will be, is that right?

A. That's it.

Q. I see. Then sometimes you have kind of a slim crop even when you don't use Elgetol, isn't that right?

A. Oh, once in a while, yes.

Q. I've heard of it. There are a good many causes that go in here toward a crop being small that year, or nil, isn't that right?

A. That particular year, you mean?

Q. Yes sir, that particular year.

A. A good many causes?

Q. Yes.

A. On whose crop, everybody's, or just mine?

Q. Yours. A. Oh, I don't know, no.

Q. Had you had a good crop in '44?

A. '44 was on the Jonathans, was somewhere in the neighborhood of seven thousand boxes, between seven and eight thousand boxes.

Q. Well, is that what you would call a good crop; a large crop? A. No.

Q. How about the Winesaps and Delicious, or

(Testimony of H. K. Stahler.)

the Romes? I mean had you had a big crop in '44, or a small one? A. About an average. [154]

Q. About an average? A. Uh huh.

Q. Was your '44 crop cut down some because of mildew?

A. I don't know. I don't know whether mildew was the cause of it or not. It was cut down some from '43, yes.

Q. Was mildew a problem in your orchard in '44? A. In the Jonathans it was.

Q. Did you have some trouble in '44 getting enough thinners to get the trees thinned fast enough? A. Yes.

Q. That resulted, would result in an off and on year, wouldn't it? In other words, when the thinning isn't done on time it takes a lot of vigor out of the tree, isn't that correct? A. Yes, sir.

Q. And you were anxious to get a chemical thinner if possible to steady the production from year to year, isn't that correct?

A. That's correct.

Q. Had you read reports in the Horticultural Magazine written by Mr. Reeves and his associates?

A. No, I hardly ever read those.

Q. You don't read the Horticultural Magazine at all; and did you read the Ortho News at all, any of them? A. No. [155]

Q. Did you read any of these articles put out by Mr. Luce and Mr. Carver?

A. Yes, I read those once in a while.

(Testimony of H. K. Stahler.)

Q. Did you read these particular two, referred to in evidence as Defendant's Exhibits 1 and 2?

A. Well, now, I couldn't say; I wouldn't remember that far.

Q. You wouldn't remember; how long, over what period of time were you putting the calyx on?

A. That takes about five or six days.

Q. Did you put the calyx on the Jonathans and Romes before or after you applied the thinner on the Saps?

A. The calyx should be afterward.

Q. Do you remember whether you did or not in this particular case?

A. Yeh, the calyx would be afterwards.

Q. It was afterwards? A. Yes.

Q. The calyx on both varieties? A. Yes.

Q. Had you ever had experience with mildew control before using Elgetol?

A. No, I never sprayed for mildew before.

Q. Did you know this standard recommendation as to when to apply mildew spray?

A. Well, I've heard of it, heard it talked about.

Q. And it was in the pink and the calyx?

A. Yes, sir.

Q. You heard that from sources other than Dr. Regan, too, didn't you? A. Oh, yes.

Q. As a grower I take it that you know that was the standard recommendation for a mildew spray, applied in the pink and in the calyx?

A. Yes, sir.

Mr. McKelvy: I think that's all.

(Testimony of H. K. Stahler.)

Redirect Examination

By Mr. Hawkins:

Q. You used lime and sulphur in 1946, is that right? A. Yes, sir.

Q. For a mildew control? A. Yes, sir.

Q. Did you still have mildew in 1946?

A. Yes; there's some there yet.

Q. And what was the respective or comparative conditions in 1945 and 1946 on mildew?

A. Well, in '46 we had a different spring; it wasn't so wet, and the lime and sulphur cleaned it up better.

Q. Beg pardon?

A. Lime and sulphur cleaned the mildew up better in 1946 than it did in 1945.

Q. Than the Elgetol did in 1945? [157]

A. Yes, sir.

Q. You did not use lime and sulphur in 1945, did you? A. No.

Q. Now, Dr. Regan, according to your testimony on cross examination, told you that in 1944 Elgetol had been used for a thinner, and that good results, so far as mildew control, was noticed. That was in '44 he told you that? A. That's right.

Q. And did he tell you that it was applied in the pink and the calyx in '44? A. No.

Q. He told you that it was applied in full bloom in 1944? A. Yeh, for a thinner.

Q. And he not only told you that, but he told you to go ahead and use it as a mildew control in 1945, didn't he?

(Testimony of H. K. Stahler.)

Mr. McKelvy: Objected to as leading.

The Court: That is leading. Objection sustained.

Mr. Hawkins: Well, counsel leaves the inference that Dr. Regan merely told him it was used as a thinner in 1944, and that results were noticed with respect to mildew control. The point I am making is that he not only told him that, but he affirmatively told him to use it as a mildew control.

The Court: Can't you bring out what you want without leading the witness? [158]

Redirect Examination

(Continued)

Q. What else did Dr. Regan tell you besides that it had shown good results in '44?

A. Well, I don't remember what he said about that. He just thought it would control it in '45, if it controlled mildew as a thinner; he thought it would work as a regular mildew spray.

Q. I notice that Plaintiff's Exhibit F refers to a calyx spray. Did he write out a card for you with the pink spray, in connection with the pink spray?

A. I don't believe he did.

Q. He just told you that orally?

A. Yes.

Q. And you followed his instruction in the application?

A. Yes, sir.

Q. Did Dr. Regan advise you how long this material had been tested?

A. No.

Q. Did he tell you that it had been used in the east for some time?

A. Yes.

Q. As a commercial thinner, or chemical thinner, I mean?

(Testimony of H. K. Stahler.)

A. Well, he didn't really say what it was used for, but he said it had been used in the east before. I don't remember what he said for. [159]

Mr. Hawkins: I notice it is twenty-five minutes to five. Does your Honor wish to adjourn?

The Court: Will it take some time?

Mr. Hawkins: Yes, I want to go into some other matters with this witness.

The Court: The Court will adjourn, then, until tomorrow morning at ten o'clock, and the jury will remember the instruction given as to not discussing the case with anybody, and keeping an open mind about it.

(Whereupon, a recess was taken in this cause until Tuesday, January 28, 1947, at ten o'clock a.m.) [160]

Yakima, Washington, January 28, 1947
10 o'clock a.m.

(All parties present as before, and the trial was resumed.)

The Court: It isn't too easy to hear in this courtroom, and I am going to request counsel and the witnesses who testify to speak up, and speak distinctly, so that the jurors can hear you. That applies to the attorneys and witnesses and myself and everyone else who talks here, because the jury isn't in a position to perform their duties unless they hear what goes on in the courtroom. You may proceed.

(Testimony of H. K. Stahler.)

Redirect Examination of H. K. Stahler

(Continued)

By Mr. Hawkins:

Q. Mr. Stahler, I didn't quite understand what you had to say about the two rows of Winesaps yesterday.

A. The two rows of Winesaps were beside the Jonathans, and we sprayed those as a precaution, so the mildew wouldn't spread any further.

Q. And what spray did you apply on those two rows of Winesaps?

A. I think that was the calyx spray, if I remember right.

Q. The calyx spray?

A. I think so; just one spray.

Q. Now, as I understand your testimony, you sprayed one [162] block of Winesaps as a thinner?

A. Yes, sir.

Q. Or for the purpose of thinning them, is that right?

A. That's right.

Q. And was there another block of Winesaps that you did not spray at all, with Elgetol, I mean?

A. Yes, sir.

Q. And what sort of a crop did you have on that block that you did not spray at all?

A. We had a pretty good crop.

Q. Now, in going over the items of extra expense that you would have been put to had you had a full crop, there is one item, I think, that we overlooked yesterday, and that was the spray material. I believe

(Testimony of H. K. Stahler.)

you testified as to the amount of labor that would have been necessary had you given the Jons these three extra sprays, but you did not testify as to the material. What would the material have cost in 1945 for those three sprays?

A. Well, somewhere around seven hundred dollars I think would cover it.

Q. Something in the neighborhood of seven hundred dollars? A. I think so.

Q. And then that sum of seven hundred dollars would have to be added to the figures you gave yesterday? A. Yes. [163]

Q. To determine the amount of extra cost that you would have been put to, is that right?

A. Yes, sir.

Q. Now, as I understand it, you sprayed all of your Jonathan orchard with Elgetol?

A. Yes, sir.

Q. In the pink and in the calyx?

A. Both sprays.

Q. And you sprayed your Romes in the pink and in the calyx, is that right? A. Yes.

Q. But with your Winesaps, two rows of Winesaps you sprayed in the calyx for mildew?

A. Yes.

Q. And a certain block you sprayed as a thinner?

A. That's right.

Q. And the remainder of your Winesaps you did not spray with Elgetol, is that right?

A. That's right.

Mr. Hawkins: I think that's all.

(Testimony of H. K. Stahler.)

Recross-Examination

By Mr. McKelvy:

Q. Mr. Stahler, why didn't you spray the so-called remainder of your Winesaps?

A. Well, I had that block there that was so heavy with bloom I didn't want to thin by hand, and the rest of it [164] wasn't quite as heavy, and I only had two days to do it in, so I couldn't do it all.

Q. What?

A. Couldn't do it all in two days.

Q. Did you thin them by hand?

A. Yes, sir.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

JOHN P. EVANS

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. John P. Evans.

Q. John P. Evans. Where do you live, Mr. Evans?

A. Yakima.

Q. And how long have you lived in Yakima?

A. Since 1913.

(Testimony of John P. Evans.)

Q. And what is your occupation, sir?

A. Auditor of the Yakima County Horticultural Union.

Q. Would you speak up just a little bit louder, Mr. Evans?

A. Auditor of the Yakima County Horticultural Union.

Q. And how long have you had that position?

A. Thirty years. [165]

Q. Thirty years; and what are your duties as auditor, Mr. Evans?

A. Everything in connection with the accounting and the records of the organization.

Q. And do you come in contact with the prices that are paid for fruit—apples? A. Yes.

Q. Each year? A. Yes.

Q. And you are familiar with the prices paid for apples each year? A. Yes.

Q. To the grower? A. Yes.

Q. And do you have the figures for 1945, the Jonathan apple figures? A. I do.

Q. Would you state to the jury what those were?

A. We paid the growers net on extra fancy and fancy combination, 216 and larger, one hundred seventeen dollars and eighty-two cents; sizes 234 to 252, one hundred fourteen dollars and eighty-six cents; on jitneys, those are apples smaller than 252, sixty-five dollars twenty cents; on the C-grade—

Q. Just a moment; are those figures per ton?

A. Yes. On the C-grade, two and a quarter inches and larger, one hundred seventeen dollars

(Testimony of John P. Evans.)

and eighty-two cents; and on smaller than two and a quarter, forty-three dollars and ninety cents. For the two and a quarter and larger culls, forty-eight dollars a ton, and the small culls, twenty-eight dollars a ton.

Q. And those were the fair market prices of Jonathan apples in 1945?

A. I would presume so, Mr. Hawkins; we handled 2065 tons.

Q. And that was the price paid on those; and what figures do you have on Winesaps?

A. Extra fancy and fancy combination, 216 and larger, one hundred sixteen dollars and forty cents; 234's and 252's, one hundred thirteen dollars and eighty cents; and smaller than that, one hundred four dollars and forty cents. C-grade, two and a quarter and larger, one hundred sixteen dollars and forty cents; the smaller than that, forty-two dollars and forty cents. The large culls, fifty-five dollars and sixty-two cents, and the small, twenty-eight dollars.

Q. Can you tell us, just for the purposes of comparison, how many pounds of apples there are in a loose box, on the average, or would you be prepared to answer that?

A. It varies according to the texture of the apple, but they'll run forty-four to forty-six pounds. [167]

Q. You're speaking of a packed box, now?

A. Standard packed boxes.

Q. I'm asking about a loose box.

A. A loose box of Winesaps?

(Testimony of John P. Evans.)

Q. Let's say Winesaps, yes.

A. Winesaps will run about thirty-three and one-third, in a standard box.

Q. And what about Jonathans, what will they run?

A. They're a little lighter than that, probably half a pound.

Q. They would run about thirty-two pounds to the box, loose? A. Yes.

Q. Now, would you give us your figures on market prices of Roman Beauties?

A. The combination extra fancy and fancy, 216 and larger, one hundred eighteen dollars and eighteen cents; 234's to 252's, one hundred sixteen dollars and forty cents; the small were forty-three dollars and forty cents. C-grade, two and a quarter and larger, one hundred eighteen dollars and eighteen cents; small, forty-three dollars and forty cents. Large culls, fifty-five dollars and seventy cents, small culls, twenty-eight dollars.

Q. Now, all of these figures that you have given apply to the year 1945, and they are the fair market values in 1945? [168]

A. In Romes we handled about 2600 tons, and in the Winesaps, 18,200 tons.

Q. In your opinion that is a large enough tonnage to give an idea of what the market value is, is that right? A. Yes.

Q. Could you tell us how many pounds in the loose box there would be of Romes, on the average?

A. About thirty-two and one-third.

(Testimony of John P. Evans.)

Q. About thirty-two and one-third pounds.

Mr. Hawkins: That's all; you may examine.

Mr. McKelvy: No questions.

Mr. Hawkins: That's all, Mr. Evans. May Mr. Evans be excused at this time, your Honor?

Mr. McKelvy: We have no objection.

The Court: All right, you may be excused.

(Whereupon, there being no further questions, the witness was excused.)

J. D. KECK

one of the plaintiffs, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Keck, will you state your full name, please? A. J. D. Keck.

Q. And where do you live, sir?

A. In Yakima. [169]

Q. How long have you lived in Yakima?

A. Four months less than fifty-two years.

Q. Do you own an orchard out in Naches?

A. Yes, sir.

Q. How large an orchard is that?

A. There's about 110 acres in the ranch; about 35 acres of waste land and roads; about 85 acres in tillable crops or orchard.

Q. And you have this 85 acres planted to orchard?

(Testimony of J. D. Keck.)

A. All within excepting probably an acre.

Q. And what kind of trees do you have in the orchard?

A. There are D'Anjou pears, Jonathans, Delicious, Winesaps, and Romes.

Q. How old an orchard is this orchard?

A. The first trees were planted along about 1907, and the last planting, as I recall, was about 1922 or 1923.

Q. You planted this orchard pretty largely yourself? A. Yes.

Q. You were the owner of this orchard in 1945?

A. Yes, sir.

Q. And still are? A. Yes, sir.

Q. Mr. Stahler, who was on the witness stand here, has some arrangement with you for the operation of that orchard?

A. Yes, a crop share basis. [170]

Q. Would you explain to the jury what that is?

A. I furnish the stationary power spray plant; I furnish all the spray material, and then I pay the taxes, pay the water, maintain the buildings, pay the insurance; Mr. Stahler does all the labor, spraying, pruning, thinning, hauling fruit to the warehouse, and then the fruit is sold by the Horticultural Union and the money is divided between us.

Q. Do you handle the sale of the fruit to the Horticultural Union?

A. Well, we both have contracts with the Union, so that the percentage of the fruit—his percentage

(Testimony of J. D. Keck.)

of the fruit is his, and my percentage of the fruit is mine, but coming altogether in at one time, arrangement was worked out with the Union whereby it is handled under a joint account, and then the money divided, and to simplify things, I do practically all the accounting and bookkeeping with the Union, and with their employees, all the figuring. After that then Mr. Stahler and I go over the records; he has one set of them and I have a set.

Q. Do you have the production records covering the years '42 through '46? A. I do.

Q. I wonder if we may have those?

(Whereupon, a group of statements and receipts issued by Yakima [171] County Horticultural Union was marked Plaintiffs' Exhibit "H" for identification.)

Direct Examination
(Continued)

Q. Mr. Keck, I am handing you plaintiffs' Exhibit H for identification. Will you state what those records are?

A. Those are the account sales, together with the pack-out slips of the three varieties of fruit for the years mentioned there.

Q. 1942 through 1946?

A. Yes, except that the dates on these account sales are in the spring of the year following crop. In other words, these are the dates in which the final tabulation of the fruit was made, and like in the Jonathans, Romes, and Saps, the final sales are

(Testimony of J. D. Keck.)

not completed until the following year in which the fruit is grown.

Q. In other words, this first sheet is dated April 21, 1943; to which crop does that refer?

A. To the 1942 crop.

Q. And that is true with each of these records?

A. Yes, sir.

Q. The next one refers to July 14, 1943, and that would be your 1942 crop?

A. '42 crop; except that in the '46 crop, I have nothing here except the pack-out on the Jonathans. The Winesaps and Romes have not been completed in the pack-out, so I have [172] nothing in that, and of course the account sales have not been made, and will not be made until some time the middle of this summer.

Q. Now, just for the purpose of explaining briefly what is in these records, does that show the poundage of Jonathans sold?

A. That shows the number of pounds of fruit delivered to the Horticultural Union.

Q. From this orchard?

A. From this orchard.

Q. Now, then, you have analyzed those records, have you not? A. Yes, sir.

Q. And have you averaged the tonnage that you obtained, excluding the year 1945? A. Yes.

Q. And would you tell the jury what those averages are? I will offer Plaintiffs' H in evidence.

Mr. McKelvy: I would like to be sure that I

(Testimony of J. D. Keck.)

heard correctly what years they are; 1942, 1943 and 1946?

Mr. Hawkins: 1942 through 1946.

A. Yes, 1942, 1943, 1944, 1945, and the pack-out of Jonathans in 1946.

Mr. McKelvy: I see.

The Court: Do these documents apply to all varieties, or just certain of them? [173]

A. Jonathans, Winesaps, and Romes.

Mr. Hawkins: Just the varieties we're concerned with here.

Mr. McKelvy: We have no objection to the offer, your Honor.

The Court: Admitted.

(Whereupon, Plaintiffs' Exhibit "H" for identification was admitted in evidence.)

Direct Examination

(Continued)

A. You want the average tonnage of 1942, 1943, 1944 and 1946; on the Jonathans was 141.82 tons.

Q. In other words, from 1942 through 1946, excluding 1945, you averaged 141.82 tons per year of Jonathans? A. Correct.

The Court: This is just a computation of the averages from Exhibit H?

Mr. Hawkins: That's right.

Direct Examination

(Continued)

Q. And what figure do you have on Saps?

(Testimony of J. D. Keck.)

A. An average for those same four years of 309.934 tons.

Q. 309 tons average; and what is your average over those years on your Romes?

A. 220.443 tons.

Q. What do your records show was your actual production in 1945? [174]

A. There was no Jonathans at all. I might deviate from that in this way, and say that there probably was an occasional apple through the orchard; there was none picked for commercial use, or even for home use.

Q. That was the year your orchard was sprayed with Elgetol? A. Yes, sir.

Q. And what was your actual production of Saps in '45? A. 243.956 tons.

Q. And what was your actual production of Romes in 1945? A. 85.326 tons.

Q. And can you state from those records what your estimated loss in 1945 was?

A. Taking it from the average, it will put the Jons at 141 tons, and the Winesaps at 66 tons, and the Romes at 135 tons.

Q. Now, with respect to your Jonathans, you had no crop in 1945? A. No.

Q. Did you from Exhibit H estimate the average per cent of those various varieties, that Mr. Evans has referred to? A. Yes, I have.

Q. And applying those average percentages against the 141 tons of Jonathans, what figure do you arrive at as being the fair market value, or would

(Testimony of J. D. Keck.)

have been the fair market value, of that 1945 Jonathan crop? [175]

Mr. McKelvy: Object to the question, because the record as it now stands shows the operator of this orchard did not expect a full crop in 1945, regardless of Elgetol.

The Court: Well, I will overrule the objection, and let it come in for what it is worth.

A. Fourteen thousand one hundred forty dollars and sixty-six cents.

Q. Fourteen thousand one hundred dollars and sixty-six cents? A. Yes.

Q. Now, with respect to the Saps—

The Court: Was that the Jonathans you just referred to? A. Yes, sir.

Q. Now, with respect to the Saps, you did have some crop of Winesaps in 1945?

A. In 1945 we had an actual tonnage of 243.956.

Q. And you took the percentages?

A. I used the percentages for the same prices and the same percentages as those actually sold in 1945.

Q. And applied that to the loss of sixty-six tons?

A. Yes, sir.

Q. And what figure did you arrive at as to your loss in connection with your Winesaps? [176]

A. Seven thousand four hundred thirty two dollars and eighty two cents.

Q. And with respect to the Romes?

A. I used the same method there as I did with the Saps, because we had Saps, I mean Romes, that

(Testimony of J. D. Keck.)

year, and using the same manner of figuring, arrived at a figure of fourteen thousand seven hundred seventy three dollars and sixteen cents, and adding the three together makes a total of thirty six thousand three hundred forty six dollars and sixty four cents.

Mr. Hawkins: Your Honor, at this time I would like to move that the complaint of Mr. Keck and Mr. Stahler against the California Spray-Chemical Corporation be amended so that the amount asked be increased from the twenty one thousand to the thirty six thousand dollar figure that Mr. Keck just testified to. I think the amendment is in order, because it is in accord with the testimony that has been introduced by Mr. Keck, and we ask that it be made at this time.

The Court: I believe I will have the jury step out during this discussion.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. Hawkins: I might suggest to counsel at this time that we will probably be through with our case very [177] shortly.

The Court: Then I assume there will be a motion or motions to make?

Mr. McKelvy: Yes.

The Court: Do you have objections to this amendment?

Mr. McKelvy: Yes, I very strenuously object to the amendment, first, for the reason, of course, it comes entirely as a surprise to us; this is not a

(Testimony of J. D. Keck.)

matter that should have to develop in trial, when this case has been on file since the first day of September, 1945; that's the date of the complaint, in any event. That very material and substantial difference puts us in a position now where we will have no chance at all of checking it, but in the second place, under the evidence, this testimony, as indicated by my objection, is upon the plaintiff's own record, in any event. Mr. Stahler, your Honor will remember, said that he did not expect more than half a crop in the Jonathans, regardless of Elgetol, and some other low percentage, I think, in other varieties; so that's asking for an amendment of over sixteen thousand dollars, and certainly puts the defendant in a place where we would have no opportunity whatsoever to check on it, and it is a very substantial difference.

The Court: Well, if it were anything else except amount, here, I would be very reluctant to grant it, particularly without giving the defendant a chance for continuance if they thought they needed it, but I think I will grant this motion for an amendment, because it does apply only to the amount, and I assume that amount would depend upon the production of apples during that year and the price during 1945 and other years, and that's a matter that should have been checked by the defendants. I don't know whether it would make a great deal of difference in the character of the checking whether they claim twenty one thousand or thirty six thousand. Of course the matter

(Testimony of J. D. Keck.)

of what could have been expected during 1945 I think is a matter of defense, to show they're not entitled to the amount claimed, but on the basis that no substantial prejudice results to the defendants, I will grant the motion to amend.

Mr. McKelvy: Exception.

The Court: Yes, and allow an exception. Do you want to amend this by interlineation? It is the one, just the Keck case.

Mr. Hawkins: Your Honor, do you care to have instructions submitted to you by the respective parties?

The Court: Yes, I would like to have them.

Mr. Hawkins: I have them ready at any time your Honor wishes them. [179]

The Court: All right, you can submit them any time before the close of court today, because I wouldn't have time to go over them until tonight anyway.

Mr. Hawkins: The witness just called my attention to the fact that the reason we did not have the records until recently was because, of course, the 1945 crop isn't packed out until well into 1946, and at the time the complaint was drafted and these pleadings were brought to issue it was impossible to get these figures.

Witness: The dates on my exhibit there will show the dates on which they were available in 1946.

The Court: You may bring in the jury.

(Testimony of J. D. Keck.)

(Whereupon, the following proceedings were had within the presence of the jury:)

Mr. Hawkins: You may cross-examine, counsel.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Keck, what kind of a crop did you have on your place in 1946?

A. Well, referring to the records here, we had a good crop.

Q. What kind of a crop was it in '46 compared to '44, large or small?

A. From the records, it was a heavier crop.

Q. Heavier crop in 1946?

A. In 1946, than 1944.

Q. Let's see, you compared, or averaged, the years from [180] 1942 through 1946, exclusive of 1945?

A. Yes, sir.

Q. Was 1946 the best crop that you had on that place during any of those years, that is, 1942, 1943, 1944, 1945, and 1946?

A. Well, now, no; 1943, the Jonathans and Saps were heavier than in '46; the Romes were a little lighter.

Q. Would it be fair to say that judging from the years you have known about that orchard, that '46 was about as good a crop as you ever get or ever expect to get?

A. I think it was a good, fair, or a big crop,

(Testimony of J. D. Keck.)

yes. Now, some years might boost one variety a little bit more, or one down.

A. I understand.

Mr. McKelvy: That's all, thank you.

Mr. Hawkins: That's all, Mr. Keck.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: I would like to call Mr. Matson at this time.

HAROLD MATSON

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Your name, sir?

A. Harold Matson. [181]

Q. Where do you live?

A. Seven miles northwest of Yakima.

Q. And you work for the California Spray-Chemical Corporation? A. I do.

Q. And how long have you worked for them?

A. Off and on, for six years.

Q. You're working for them at the present time, are you not? A. I am.

Q. And you were working for them in 1945?

A. Part of that year.

Q. And also in 1944?

(Testimony of Harold Matson.)

A. Yes, part of that year, too.

Q. And during those years '44 and '45 your company was the sole distributor of Elgetol in the Yakima Valley, isn't that right?

A. That's right.

Mr. Hawkins: That's all.

Mr. McKelvy: No questions. That's all; you may step down.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: The plaintiffs rest, your Honor.

Mr. McKelvy: At this time, we would like to take up a matter with the Court in the absence of the jury. [182]

The Court: Yes, I will have to ask the jury to go out again.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. McKelvy: At this time, the plaintiffs in each of the cases consolidated here for trial having rested, the defendant in each case challenges the legal sufficiency of the plaintiffs' evidence in each of the cases now on trial, and moves the Court for dismissal of each case with prejudice on the following grounds and reasons: First, that the plaintiff has failed to—let me say this for the record; when I say plaintiffs, the same thing applies to each case unless I indicate otherwise; the plaintiffs have failed to sustain the burden of proving any action-

able fact or facts, regardless of what theory the complaint or the case may be brought. There is no warranty; no sale; therefore, under the law of this jurisdiction, no warranty, which is an incident of a sale. The plaintiffs' evidence has fallen short.

The Court: If you will pardon me for interrupting, I would like to ask Mr. Hawkins at this time if there is any contention on behalf of either of these plaintiffs that they directly or indirectly purchased this spray material from the defendant corporation?

Mr. Hawkins: The testimony is that they bought [183] the spray from dealers, and that the California Spray-Chemical Corporation was the only distributor of the product Elgetol in the valley. We do not rely on an implied warranty of sale, because there was no sale between the California Spray-Chemical Corporation and the plaintiffs. Does that answer your question?

The Court: The reason I ask that question, in the Morris Hardware case, it was held that the grower plaintiff purchased through the Wenatchee Produce Company, but the Wenatchee Produce Company had been financing the grower, and the court took the position that the Wenatchee Produce had bought the spray material from the Morris Hardware as an agent of the grower. I wondered if you were claiming any such situation here?

Mr. Hawkins: No.

The Court: You're not claiming implied warranty, then?

Mr. Hawkins: No.

Mr. McKelvy: The plaintiffs have failed to produce any evidence showing any negligence on the part of the defendant, and further, that any actionable negligence, if proven, is not actionable under the law of this jurisdiction, inasmuch as the product involved here does not involve life or limb, nor is it liable to in the future, nor does the case deal with an inherently dangerous [184] product such as the rule has been applied where there was no sale. Further, that the evidence falls short of showing or making a prima facie case on the theory of fraud by clear, cogent and convincing evidence. None of the elements are present, nor could the trier of the facts conclude from the evidence that the elements required are here. Fraud is not proven here even by preponderance, and the law being that clear, cogent and convincing evidence is something more than preponderance makes it clear that the record is insufficient to go beyond this point on that question. Next, for the reason that the plaintiffs have failed to show that they relied upon any statement or recommendation made by the defendant, which was a statement of anything other than an opinion or an actual fact. In other words, there is no showing here of reliance by the plaintiffs upon some statement which was made that was not a fact, or that was more than an opinion, based on the fact that the product had been used in 1944 here in the valley by certain growers. On that subject I should say this, that the plaintiffs knew the source of information that the defendant based its statements upon through its agents, and therefore

were in the same basis and required to use judgment, their own judgment, in investigation and in application of the product, the same as the defendant. [185] Finally, the plaintiffs have failed to show that the proximate cause of the loss of which they here complain was the result of using Elgetol. True, they have shown a loss or a short crop in 1945, but the law is that they must go beyond merely showing that there was a loss, that they used Elgetol, and thereby conclude that it was caused by the use of Elgetol.

There are many causes; the plaintiffs here admit themselves that trouble from sprays arises, and weather, and one plaintiff agreed that he did not expect a full crop. Finally, in connection with the damages claimed here, we at this time move to strike all of the testimony in connection with the alleged damages in the Emerson case, first, for the reason that the evidence does not bring that question beyond a mere conjecture; if a jury or trier of the fact would have to decide the question of damages now it would have to indulge in speculation, or guess, because the evidence shows there was a certain amount of cost of operating, a certain amount taken in, but pears were involved there; there is no evidence at all of what the pears brought, or what they cost, so that right now, if we said to the jury, "What was Emerson's damage?" they would have to indulge in speculation. We move that question be stricken because of the inadequacy of the evidence. The same motion [186] is made in the Keck case, to strike the evidence of

damages and withdraw the question at this time, for the reason that that plaintiff has not sustained the burden of proving by preponderance that the damage he complains of was caused by Elgetol, and has failed to show by preponderance of evidence what the damage was, if there was any damage by Elgetol. The jury here would again have to speculate, so far as the Keck case is concerned, if they were to decide the question of damages at this time.

Now, your Honor, I don't know how much you want to hear at this time, on this subject, but we have just handed your Honor a memorandum that may or may not be helpful, and a copy to counsel. I have no way of knowing from the pleadings, or even from the evidence here, exactly what counsel claims is the case that will take it past this point, but at least I can address myself to those things which I think did arise in the evidence, and possibly have something to talk about.

The Court: Well, I think that I would like to have your motions fully covered. Use a reasonable economy of time, but I would like to have them fully covered, because I had proceeded on the erroneous assumption that this was an implied warranty case. I think it is evident from the pleadings, when you examine [187] them closely, that it is not, but I wasn't here on the motion to dismiss or any preliminary proceedings.

(Whereupon, Mr. McKelvy addressed the Court in support of his motions on behalf of the defendant; Mr. Hawkins addressed the

Court in opposition to the motions of the defendant; and Mrs. Curry addressed the Court in support of the motions on behalf of the defendant.)

(Whereupon, a recess was taken until 2:00 o'clock p.m.)

Yakima, Washington

January 28, 1947

2:00 o'Clock P.M.

(Whereupon the following proceedings were had without the presence of the jury.)

(All parties present as before.)

(Whereupon, Mr. Hawkins addressed the Court in opposition to the motions of the defendant.)

The Court: The rule seems to be pretty well settled in this state that so far as express or implied warranty is concerned, each purchaser must look to his immediate vendor if he is to recover either on the theory of express or implied warranty, but there are certain well-defined exceptions; as Judge Chadwick pointed out in the Mazzetti case, in 75 Washington 622, the exceptions are where the thing sold is noxious or dangerous, or where there is fraud or deceit on the [188] part of the seller in inducing the purchaser to buy, or where there has been negligence in respect to the sale of the thing not imminently dangerous. At least by the weight of authority that third exception seems to have

been limited to things that are imminently dangerous to life or health.

However, I am not so sure that under the circumstances of this case, where, as counsel has pointed out, a distributor of the product undertakes to give specific directions as to how it shall be used, for a purpose other than the purpose for which it was manufactured, and of course here I have to take any substantial evidence as true—the evidence must be considered in the light most favorable to the plaintiff, for the purpose of these motions, I am not so sure that there isn't the duty of care on the part of one supervising or directing as to how a grower should apply this spray, and if there isn't that due care, then it seems to me there is some negligence on the part of the defendant. At any rate, I am going to deny the motions at this stage of the proceedings. I have said what I have said merely to indicate what the Court is thinking about, and I assume they will be renewed at the conclusion of the defendant's evidence, and will again be considered before the case is submitted to the jury. You may proceed. [189]

Mr. McKelvy: May I ask a question, having in mind instructions?

The Court: Well, I think before you ask the question I will try to clarify my position a little more. I think here the plaintiffs under the evidence before the court could not rely upon express or implied warranty. I don't believe there is enough here that would enable them to recover on the theory of fraud or deceit. I think if they are

going to the jury at all it must be upon the theory advanced by their counsel, that under the peculiar circumstances here, there was the duty of care on the part of the defendant and its agent, Dr. Regan, not to recommend—not merely recommend, but to specifically direct that this spray be used for a particular purpose, and give definite and specific instructions as to how it should be applied; that they owed the duty of care in determining whether or not it was safe for that purpose, and if there was any negligence or breach of that due care, there might be a liability. Now, that's the only theory the court has in mind.

Mr. McKelvy: Well, that answers my question that I was going to ask.

(Whereupon, the following proceedings were had within the presence of the jury.)

(Whereupon, Mr. McKelvy made an opening statement [190] to the jury on behalf of the defendant.) [191]

FRED C. SQUIRE

called as a witness on behalf of the defendant, being being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy: [217]

Q. What is your name, please?

A. Fred C. Squire.

Q. Where do you live, Mr. Squire?

(Testimony of Fred C. Squire.)

A. About four and a half miles west of Yakima, on the Naches highway.

Q. And what is your business?

A. Orchardist and bookkeeper.

Q. You're bookkeeper where?

A. At the Yakima Farmers Supply Company.

Q. Do you handle spray goods there as well as other things? A. Yes, sir.

Q. How much of an orchard do you operate?

A. Fifty-five acres.

Q. Where is it located?

A. Part of it is where I live, and part of it is on Fruitvale Boulevard and Franklin Avenue, just west of town, about three miles.

Q. Have you ever used Elgetol?

A. Yes, sir.

Q. Have you ever used it in the pink, for mildew control? A. Yes, sir.

Q. Have you ever used it in the calyx, primarily for mildew control? A. No.

Q. When did you first use Elgetol? [218]

A. 1944.

Q. And how did you use it then?

A. I used it for thinning purposes that year.

Q. And how much—do you remember how much you used to a hundred gallons, or how?

A. I think we used a pint to the hundred.

Q. And what results did you get from Elgetol in 1944?

A. Very, very satisfactory, from a thinning standpoint.

(Testimony of Fred C. Squire.)

Q. Did you notice anything at all about mildew control in 1944?

A. I don't remember that we were bothered with mildew that year.

Q. And did you use it in 1945? A. Yes.

Q. Over how much orchard, would you say, in 1945?

A. Well, we used it on all the same things that we did in 1944, Jonathans and Romes. We have one ten acres of which, oh, I would guess probably five acres of it is Jonathans and Romes, mostly Romes, a small lot of Jonathans.

Q. And how did you use Elgetol in 1945?

A. I used it on the Jonathans in the pink for mildew purposes, and then in full bloom again as thinner, same as the year before.

Q. And how much did you use in the pink? [219]

A. A pint, if I remember correctly, that same dosage as we did.

Q. And how much did you use in the calyx in 1945? A. Didn't use any.

Q. I think you said the late bloom?

A. We used it in full bloom, for thinning.

Q. And what mix did you use there?

A. Pint, as I remember it, pint to the hundred gallons.

Q. And what kind of results did you get in 1945 on mildew control, if any?

A. Quite satisfactory.

Q. And how about the thinning?

A. It was satisfactory.

(Testimony of Fred C. Squire.)

Q. Did you use it in 1946?

A. We used it for thinning purposes on trees with full bloom, I would guess about half, from half to two-thirds of the same acreage which we did the year before.

Q. And did you get any results at all in 1946, satisfactory or not?

A. Same results that we had been having, yes.

Q. Do you expect to use it in 1947 in the orchard?

A. With full bloom conditions being the same as they have been, yes.

Q. Do you know when Elgetol first came to the valley here?

A. Far as I know, 1944 was the first year that it was used, [220] maybe with the exception of very few small experiments.

Q. Did you handle Elgetol? A. Yes, sir.

Q. Do you now? A. Yes, sir.

Q. You have been in the business here quite a while. I would like to ask Mr. Squire, if you know whether or not there is a standard recommendation or standard practice as to when a mildew spray should be applied, regardless of whether it is Elgetol or any other material?

A. Well, in case of bad mildew, the general recommendations, as I remember them, are to start with a pre-pink, then a pink, then a calyx:

Q. Pre-pink, pink, and calyx? A. Yes.

Mr. McKelvy: You may cross-examine.

(Testimony of Fred C. Squire.)

Cross-Examination

By Mr. Hawkins:

Q. The standard spray for mildew is lime and sulphur, is it not, Mr. Squire? A. Yes, sir.

Q. Are there any other sprays that are used for mildew control. A. Elgetol was.

Q. It is not generally being used now, is it?

A. Not generally, no. [221]

Q. Not for mildew control. You buy your Elgetol, or the Yakima Farmers Supply buys their Elgetol, from California Spray?

A. That's right.

Q. And do you give out recommendations with respect to its use?

Mr. McKelvy: I object to that as immaterial here.

The Court: I don't think it is proper cross-examination. I'll sustain the objection.

Cross-Examination

(Continued)

Q. You spoke of experiments before 1944 with the use of Elgetol in this valley. Did you know of any, personally?

A. I don't know; I said I didn't know whether there was any, for sure, or not. There might have been a few small amounts used.

Q. Do you know of any? A. No, I do not.

Q. The first time your company handled Elgetol was in 1944, isn't that right?

(Testimony of Fred C. Squire.)

A. I don't know; we may have handled it in 1943 for dormant application.

Q. For a dormant spray?

A. I don't remember.

Q. It was not sold as a thinner prior to 1944, was it?

A. Far as I know, no. [222]

Q. There is no one else in the valley that distributes Elgetol besides the California Spray-Chemical Corporation?

A. So far as I know not.

Q. Was your crop reduced in 1945?

A. No.

Q. You had good thinning?

A. Well, it was good to the point of commercial effectiveness, yes.

Q. That is, it killed all the blossoms but the king blossom, generally speaking?

A. I wouldn't say it killed all the blossoms but the king blossom, no. It thinned the crop enough that we had to do very little hand thinning. We still had a good crop.

Q. When you thin a tree about how many apples do you usually knock off, assuming that you have a good set to begin with?

A. I can't answer that as to percentage.

Q. About three fourths?

A. If you've got a real heavy bloom you might have to take off as high as seventy five per cent, with an exceedingly heavy bloom.

Q. If this is to be a good thinner, then, you

(Testimony of Fred C. Squire.)

would have to kill about seventy five per cent of the blooms, isn't that right?

A. I doubt if that would be true. [223]

Q. If it killed half of the blooms it would be?

A. Probably would be a pretty effective job.

Q. It would be an effective job if it killed one half? In other words, if it is to be effective as a thinner it should kill about half of the blooms?

A. With a full bloom, yes.

Q. And of course, if you don't have a full bloom you wouldn't use it?

A. That's correct; I don't use it unless I have a good bloom.

Q. You yourself wouldn't use it unless you had a full bloom? A. That's correct.

Q. Now, as I understand it, you have never used Elgetol in your calyx spray, is that correct?

A. That is correct.

Q. And when you speak of the usual method of applying a mildew control being in the pink and in the calyx, you're speaking principally of the lime and sulphur spray, isn't that right?

A. That's what the recommendations are for, yes.

Redirect Examination

By Mr. McKelvy:

Q. Do you handle lime and sulphur spray at the Yakima Farmers Supply? A. Yes, sir.

Q. Now, when you used this on the Jonathans

(Testimony of Fred C. Squire.)

for mildew in [224] 1945, did you get good control of mildew, or not? A. Very good.

Q. Did you get any damage to the trees or to the foliage? A. No.

Mr. McKelvy: I think that's all.

Recross-Examination

By Mr. Hawkins:

Q. An action has been brought against your company for Elgetol spray damage, isn't that right?

Mr. McKelvy: I object to that as not proper cross-examination.

The Court: I'll overrule the objection, to show interest.

A. I understand that there is, yes.

(Whereupon, there being no further question, the witness was excused.) [225]

WILLIAM S. REGAN

recalled as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name? A. William S. Regan.

Q. You live here in Yakima, Dr. Regan? [247]

A. I do.

Q. And what is your profession?

A. I am an entomologist.

Q. Would you give us something of your work,

(Testimony of William S. Regan)

and your qualifications as an entomologist, that is, what studying you did, what schools you attended?

A. I took my Bachelor of Science at the Massachusetts State College, and after graduation I was with the State Department of Agriculture for about six years, five years, perhaps, then I went back and finished my work for Doctor of Science.

Q. And you received your Doctor of Science at what school?

A. At the same institution. I was in the Department there, teaching, from 1915 to 1921, and then I had an opportunity to go to Montana and I was there for about three years, and then came to Yakima.

Q. Came to Yakima. Fishing was better in Yakima, was it? A. Excuse me?

Q. Was the fishing better than in Montana?

A. Not any better than Montana. No, I'd like to go back.

Q. You came here in what year?

A. In '25.

Q. Then what type of work have you done here in the valley since 1925?

A. Well, in the earlier days I had quite a bit of experimental work to do, and during the odd moments I would call on growers to discuss their problems with them, and gradually it developed into a certain amount of advisory work.

Q. Have the problems of the growers changed at all during the time you have been here?

A. They have changed a great deal.

(Testimony of William S. Regan)

Q. Has mildew become a problem with apple growing, and pears, and other things?

A. It seems that mildew works in cycles. We have periods of years when the mildew is not bad, due to, you might say, warm, dry weather, and then we might get a cycle of years when there is more rain, humidity, and warm weather along with that promotes mildew.

Q. You have been employed by the California Spray-Chemical Company since 1925?

A. That's right.

Q. Now, was Elgetol used here in the valley in 1944?

A. Yes.

Q. To what extent, Doctor?

A. Well, there are quite a number of growers who used it, primarily for bloom thinning.

Q. And what results did they get, generally?

A. I think they were almost entirely satisfactory. If there were any other results it was lack of thinning rather [248] than over-thinning.

Q. Was anything observed in 1944 by the growers that used it, as to mildew control?

A. Yes, many growers reported that there was outstanding control of mildew.

Q. What do you know, or did you know, of Elgetol, so far as any use of it in any part of the country is concerned?

A. We knew very little excepting reports that we had had from the east.

Q. Had it been used in the east before?

(Testimony of William S. Regan)

A. Yes, it had been used there quite a number of years.

Q. Did your concern get it here for the purpose of chemical thinner, or for what purpose?

A. Well, quite a number of growers apparently had been reading articles, apparently, about the work that was done in the east with this material, and asked us if we couldn't obtain it for them.

Q. And did you obtain it for them?

A. We did.

Q. Now, after the growers reported some control of mildew in 1944, what happened in 1945 so far as mildew was concerned?

A. Well, many of these growers made up their minds on their own observation that they wanted to use this material for mildew control. [249]

Q. Wasn't there sort of a gap on mildew control so far as sprays were concerned, at that time?

A. I don't—

Q. Did they have anything that would check and take care of mildew other than Elgetol?

A. Well, lime and sulphur was the standard material, but many growers were not getting satisfactory control with lime and sulphur, and in the second place, if they used lime-sulphur it would delay the use of summer oil to a point where codling moth, as it did in some instances, took over the crop. That's why growers were interested in some material that offered prospects of doing a fair job on the mildew.

(Testimony of William S. Regan)

Q. Was there any problem so far as thinning was concerned, at that time?

A. Well, labor was scarce at that time, due to the war, and many of the jobs of thinning were so delayed, due to difficulty in obtaining help, that fruit was pretty well sized up before it was thinned, and that put a very heavy drain on the crop for the following year.

Q. Now, so far as the use of Elgetol is concerned, when did you first talk with, we'll take Mr. Emerson first. I don't know as you can give us the exact date, but about, and how it happened.

A. The first time I met Mr. Emerson, or heard his voice, was just after he had applied the pink spray, he called the office, and I believe it was the next day I went out, in company with one of our men from California. Mr. Emerson was working on his spray rig in the upper part of the orchard. He took us down to show us, I think, Winesaps, and maybe Delicious, that he had sprayed in the pink, and he told us that he had sprayed with Elgetol the year before. He was extremely enthusiastic about it, said that it was about the best, I would say the best, mildew control material that he had ever used or had heard about, for that matter. He said that over on the other orchard, this was at the Tieton orchard, he said that over on the other orchard, I believe he calls that the Gromore orchard, there was some evidence of foliage burn, wanted to know if we wouldn't come over and look it over, and see what we thought about it, so we made an appoint-

(Testimony of William S. Regan.)

ment for the next day, and met Mr. Emerson on the orchard. There was some added burn on the foliage over the usual condition, that is, where the mildew is dried up by the Elgetol, and it seemed to be all on yellow foliage, yellow foliage we call chlorosis, and that appears to be due to an iron deficiency. We pointed that out, since this added burn seemed to be entirely on these yellow leaves, but Mr. Emerson didn't seem to think that it was serious, and didn't offer very much comment about it. [250]

Q. Did you have any talk there with Mr. Emerson, or did he inquire of you as to the advisability of using Elgetol for chemical thinning after having used it in the pink?

A. Mr. Emerson asked us, he said that he expected a pretty good bloom coming up, and asked us what about this chemical thinning. We said that growers had used it the year before for that purpose, and appeared to have been satisfied, and I referred him to Mr. Brackett, with whom he could talk and get any added information that he might want.

Q. You referred him to Mr. Brackett. Was that the gentleman on the stand; or his son, with the DuPont Company? A. Yes.

Q. The old man?

A. The old gentleman, yes.

Q. Now, this last conversation you mentioned was the same time you went out to the Gromore ranch? A. Yes.

(Testimony of William S. Regan.)

Q. Did you talk, or anyone in your office talk with Mr. Emerson at all about using Elgetol until—before the pink spray had been applied?

A. Mr. Emerson used it entirely without our knowledge in 1944, and I did not know that he was using it until after the pink spray was on in 1945.

Q. Did you tell Mr. Emerson how much, what mixture to use in [251] the calyx in 1945?

A. I have no knowledge of that.

Q. You say you don't remember whether you told Mr. Emerson how much to use or not?

A. No, I did not tell him.

Q. You did not? A. No.

Q. Now, did you talk with Mr. Emerson on any other occasion than the one you've already mentioned?

A. I think Mr. Emerson was in the office later in the summer to talk about what had occurred on the orchard. That's the only other time that I recall.

Q. Did Mr. Emerson discuss with you at the time you were at the orchard or any other time the advisability of applying Elgetol in the calyx, to control mildew?

A. That was never discussed.

Q. Dr. Regan, in using mildew sprays, regardless of whether it is Elgetol or not, is there any standard recommendation as to when it should be used?

A. The standard recommendation for mildew control is the pink and calyx, and some additional

(Testimony of William S. Regan.)

sprayings, depending upon the severity of the mildew. Sometimes the pre-pink application is advised.

Q. Why is it used or recommended to be used in the pink or pre-pink, for mildew? [252]

A. To destroy the early infection.

Q. And why recommended to be used in the calyx?

A. As a follow-up spray, because the terminal buds are later in opening, and are not opened sufficiently so that the pre-pink or pink can cover that new growth on the terminals.

Q. Incidentally, is there any particular standards or standard or definite cut and dried rules as to how, what program you use, and when the sprays are applied, in raising apples?

A. Well, there is the standard, but it will vary to a great extent in different areas around the valley. We talk about the dormant spray, and then for codling moth, the calyx and cover sprays.

Q. Were there any signs of mildew on the Emerson orchards at the time you visited them?

A. There was evidence of mildew at the Gro-more place; very little, I think, at the Tieton place.

Q. Dr. Regan, did you tell Mr. Emerson that in your opinion the Elgetol would control the two-spot mite?

A. I don't recall discussing that. It is possible, because we know that dinitro materials are effective against mites.

Q. Did you tell Mr. Emerson that you did not

(Testimony of William S. Regan.)

think there was any cause for alarm, when you went out to the ranch? [253]

A. No, I don't—I didn't make any statement, according to my memory, to that effect.

Q. Did you think that there was any cause for alarm?

A. As I mentioned a moment ago, in addition to the mildew tips which were drying up after the application, the rest of the foliage trouble seemed to be due to an abnormal foliage condition, that is, this yellow condition, and for some reason the Elgetol was causing some burn on that type of foliage.

Q. Did you tell Mr. Emerson at that time that he should come back with a calyx to take care of terminal growth?

A. My memory of what I discussed with Mr. Emerson was entirely on bloom thinning. Mr. Emerson was very much sold on the mildew control with Elgetol, and apparently it was not necessary to discuss that further with him.

Q. Did you tell Mr. Emerson that it seemed to you that there was more damage there than you had seen before during that season? I'm trying to read my own writing.

A. I think that is correct, that due to this chlorotic or off-condition foliage, there was more evidence of burn than I had seen.

Q. Now, did you ever at any time tell Mr. Emerson that your company had experimented with Elgetol?

A. No, I did not.

(Testimony of William S. Regan.)

Q. Did you ever tell Mr. Emerson that you knew anything about [254] its mildew control ability, we will put it that way, other than what you learned from growers that used it in 1944 here in the valley?

A. No.

Q. Did you actually know anything about mildew control, other than what you learned from the growers themselves during 1944?

A. Simply what we saw following the 1944 application.

Q. When you told Mr. Emerson of what reports you had had from growers in the valley as to mildew control, did you tell him the truth? Were your statements true?

A. They surely were, and as I mentioned a moment ago, my first discussion with Mr. Emerson indicated that he was very much impressed with Elgetol, on his own experience.

Q. Did you believe the statements that you made to Mr. Emerson, at the time you made them?

A. I certainly did.

Q. Doctor, is there damage ever done by applying sprays other than Elgetol?

A. There is hardly a spray material on the market today which will not cause injury under some conditions.

Q. Have you heard of other seasons, other products than Elgetol causing some burn or damage?

A. Yes. You will find in the recommendations of the Western Cooperative Spray Project Conference advice to [255] be careful about the use of

(Testimony of William S. Regan.)

lime-sulphur, that may not be the exact expression, especially on Delicious, and at certain periods there may be a very severe loss of crop.

Q. Do you know of any case of your own experience where there was damage from the use of lime and sulphur for mildew control?

A. Yes.

Q. Was that in the nature of burn?

A. Yes, and crop reduction.

Q. Now, if mildew is untreated, you have mildew in the orchard, does it affect that year's crop, and does it affect the next year's crop?

A. Well, it is difficult—I think it requires a build-up over a period of some several years before you get the—it's progressive; in other words, when the initial infection takes place, we'll say in one year, due to favorable conditions for the development of mildew that year it may not be too severe, perhaps some loss of fruit, and towards the end of the season some of the buds drying up and failing to open the following year, and if you get the proper cycle of weather it is progressively severe, and eventually reduces the crop.

Q. Would an orchard with mildew untreated in 1945 have affected the crop in that year, at all?

A. No such a thing as a crop that had not been previously [256] affected in this valley with mildew, in the mildew areas; it would be, in the cycle of years when mildew was increasingly bad, and 1945 was just another year.

Q. Now, getting to the Keck ranch, when did

(Testimony of William S. Regan.)

you first talk with Mr. Stahler in that year?

A. I believe that was in 1943, some neighboring grower upon whom I was calling said that Mr. Stahler would like to have me call.

Q. Have you known Mr. Stahler for some time?

A. I have known him for several years, yes.

Q. And did you discuss this matter of Elgetol with him in 1943? A. In 1943?

Q. When did you first discuss Elgetol with Mr. Stahler? A. It was in the early season of '45.

Q. And on what occasion?

A. We were in the orchard walking around looking over conditions; a block of Jonathans had an extremely bad case of mildew. I think one of the worst that I've seen in the valley, and had arrived at that stage where the crop was very heavily reduced.

Q. Had Mr. Stahler sprayed yet, used Elgetol at that time? A. No.

Q. How did you happen to be in the orchard?

A. Well, I believe Mr. Stahler had taken me down to look [257] over a block of D'Anjou pears that he said were badly infected with mildew the year before.

Q. All right; what was said at that time, as near as you can remember, as to the use of Elgetol, between you and Mr. Stahler?

A. Mr. Stahler had something of a severe codling moth problem coming up, and didn't want to use lime and sulphur because of the delay in using the summer oil-lead combination. We talked over

(Testimony of William S. Regan.)

the matter of lime-sulphur, and since you're not supposed to use that because it would interfere with his summer program for codling moth, the only other alternative available was Elgetol, which I mentioned. I believe he had heard about it before.

Q. What did you tell him at that time about using Elgetol?

A. Told him all we knew about it was that it had been used the year before and showed very good results, according to all the growers and what I had seen myself.

Q. And did you tell him it had been used as a mildew spray, or as a thinning spray, before?

A. I told him it had been used as a thinning spray, and that incidentally, the mildew had been stopped quite effectively.

Q. When did you see Mr. Stahler next, when you discussed Elgetol?

A. The first time that I was there was quite early, I think [258] about the dormant period or slightly after that, and some time later, and before it would be time for a pink spray, I think that I talked it over again with him, and he suggested that I write out a suggested program for the Jonathans, the Romes, and the D'Anjou pears.

Q. Did you do that? A. I did.

Q. Is that the exhibit that's here in evidence, Exhibit F, is it?

A. It's in my writing, yes.

Q. I guess it isn't dated, but this is the thing

(Testimony of William S. Regan.)

that you wrote out for him, the second time you saw him, is that right?

A. There must have been something before that, because this talks only about calyx spray.

Q. I see; did you write out anything, or just talk with him about the pink spray, if you remember?

A. Well, I'm sure I talked with him. Whether I wrote out anything I can't be certain.

Q. Why did you recommend, if you did, that the spray be made in the calyx for mildew?

A. It is standard recommendation for mildew control.

Q. And why did you suggest that it be used in the pink for mildew control?

A. That is also standard recommendation. [259]

Q. Were you ever out at the Keck ranch when the crew was spraying, during the season of 1945?

A. Yes.

Q. Now, did he spray the pears that you have mentioned?

A. Yes.

Q. And those were D'Anjou pears?

A. Yes.

Q. How would you compare the D'Anjou pears with apples as to delicacy, I mean the plant, the tree?

A. Well, the D'Anjou pear is notoriously a sort of a tender fruit.

Q. And do you know what sprays were applied to the pears?

A. There was a pink spray with Elgetol, applied for mildew.

(Testimony of William S. Regan.)

Q. And was that before the apples were sprayed?

A. That was before, because that's an earlier blooming variety or kind of fruit.

Q. What results followed the application of the pink spray on the D'Anjou pears?

A. Apparently it stopped the mildew very effectively, because at harvest the fruit was very free from mildew markings, whereas the year before I believe that Mr. Stahler said that fully half of the fruit was mildew marked.

Q. Now, could you tell by looking at the D'Anjou pear trees whether the pink spray had checked the mildew before the [260] spray was started on the apples?

A. Yes; there are several days, I believe, in there.

Q. Did you and Mr. Stahler discuss the apparent results on the D'Anjou pears before they started spraying the Elgetol on the apples?

A. I don't think we did.

Q. What was said as to Winesaps, as to how many should be sprayed with Elgetol, by you or Mr. Stahler?

A. There was an orchard road between the Jonathans and the Winesaps.

Q. A road, you say?

A. Yes, and there was a very little mildew on some of those Winesaps, and what appeared to be a pretty good bloom coming up. We discussed the matter of bloom thinning, and I told him that the year before some growers had used it and seemed to

(Testimony of William S. Regan.)

be quite well pleased, but I suggested that he just take two short rows and spray them, and wait until the tail end of the bloom, to be sure that he had a set.

Q. What did he do? Did he follow your advice or suggestion?

A. No, he went in and sprayed earlier, I would call it pretty nearly a full bloom application, and furthermore, he didn't stop there, he just went right ahead and sprayed a whole block.

Q. Why did you suggest that he spray a couple of small rows [261] and wait for the other?

A. I didn't expect he was going any more, because it was a test application.

Q. Did you tell Mr. Stahler that Elgetol was still in the test stage?

A. Well, it couldn't be in any other, from just one year's experience.

Q. What was the condition of the Jonathan orchard on the Keck ranch, so far as mildew is concerned?

A. As I mentioned, it was one of the worst cases of mildew that I've seen in the valley, and it had been for several years.

Q. Did Mr. Stahler ever tell you prior to this trial what percentage of the crop he expected if he hadn't used the Elgetol in the Jonathans in 1945?

A. We discussed the matter of crop and the matter of mildew, and the discussion led around to the fact that the mildew was so bad that he might just as well do something as let the mildew take

(Testimony of William S. Regan.)

the place, and the crop, according to my recollections, was estimated somewhere about a quarter of a crop as prospective for that year.

Q. That's because of mildew? A. Yes.

Q. Now, Dr. Regan, you were here and heard the figures given as to the crop in 1946 on the Stahler ranch; I will ask [262] you whether or not in your opinion the use of Elgetol, we'll take the Jonathans first, on the Stahler ranch in 1945, cleaned it up so as to allow a good crop in 1946?

A. I don't think that the Elgetol under the conditions did much of a job, not what we expected, but I examined the buds later in the season, and it appeared to me that the buds were forming in pretty good shape for '46.

Q. And do you credit any of that to the use of Elgetol in 1945, or not?

A. I don't know how much credit you could give the Elgetol, the weather conditions—the fact was that the mildew was so bad and the Elgetol took so much of the foliage, going in after the infection, which is fairly typical of the material, that that may account for some of the reduction of the crop, due to the destruction of the foliage, mildewed foliage.

Q. If you have a tree that is heavily or badly infected with mildew, will be Elgetol show more marks or signs where it cleans up the mildew than it would on a tree that doesn't have so much?

A. It will, because I think you will find where the mildew is bad you're going to have plenty of

(Testimony of William S. Regan.)

injured foliage, where it typically goes into the infected area.

Q. Now, so far as Winesaps on the Stahler farm are concerned, did you discuss the matter of using Elgetol to control [263] mildew on the Winesaps with Mr. Stahler?

A. Only that there was a slight amount of mildew just adjoining the Jonathans, apparently infection coming over from the Jonathans; there wasn't much, but there was some, but it was primarily the thought of bloom thinning.

Q. And what did you tell him about that?

A. If I felt certain about the material I would have told him to go ahead and spray the whole place, but these are two short rows, and heavy bloom, I thought, and I thought that it would be a pretty fair time to check it, see what it would do.

Q. Was there any mildew in the Romes on the Keck ranch?

A. Yes, the Romes were pretty badly infected, too.

Q. Did you and Mr. Stahler discuss Romes, the use of Elgetol on them? A. Yes.

Q. What was said about them?

A. Just about the same as the Jonathans; they're a later blooming variety.

Q. Did you discuss the matter of spraying with Elgetol with Mr. Stahler after the pink had been applied in 1945?

A. Well, I think we did practically all our talking about what would be done before the pink time.

(Testimony of William S. Regan.)

Q. Now, so far as a new product is concerned, I suppose in [264] your years you've seen certain new things come on the market, or not?

A. Almost every year something new appears, and right now there are plenty coming out.

Q. What is the general practice or custom where a new product appears, such as Elgetol, as to whether after it has been used by some growers, whether it goes into a test stage, or whether its use follows?

A. Well, it's customary, of course, to make experiments with any new materials.

Q. And as to Elgetol, did you make any experiments, other than on the growers' places, in '44?

A. No.

Q. Did you ever discuss the matter of using Elgetol with any of the extension men in the county, such as Mr. Luce?

A. I believe I have discussed the use in the field with them sometime, but I can't say for certain.

Q. I mean in 1945, or prior thereto?

A. No, I don't believe I ever talked it over with Mr. Luce.

Q. Had you discussed it with any of the other gentlemen, whether they were recommending it?

A. No, I didn't discuss it with any of the other men.

Q. Are there other sprays commonly used, known as DN, or Elgetol, or not? Are there any sprays that are DN besides Elgetol, that you know of?

A. There's an Elgetol spray, Dinitro Creosol;

(Testimony of William S. Regan.)

there's DN 111, used as a summer spray, which is also causing injury.

Q. Is lime and sulphur what you call a DN?

A. I didn't get that.

Q. Is lime and sulphur, would you call that a DN?
A. No.

Q. Did you talk with Mr. Stahler during the time the spray was put on the calyx at all, do you recall?

A. I happened to be on the orchard one day when they were spraying the Romes, and I think at a later date, either they were just starting, or I can't recall, maybe they had finished spraying, but it seemed to me that they were spraying in the bloom period, that is, nearer the bloom period than the typical calyx period; there was quite a bit of bloom still on the trees.

Q. That would be before the calyx?

A. That would be before the calyx, the true calyx period.

Q. Do you know whether that was being applied as a thinner, or as a mildew control?

A. Well, on the Winesaps, the thought was bloom thinning, but on the Romes, mildew.

Q. Now, as to experimenting, that you mentioned, was there any particular reason that you didn't experiment as much in those years as other years? [266]

A. We couldn't do it.

Q. Why?
A. Didn't have any help.

Q. Did you tell Mr. Emerson or Mr. Stahler at

(Testimony of William S. Regan.)

any time that your company had experimented or made any tests with Elgetol "30" as to using it for mildew or thinning? A. No.

Mr. McKelvy: You may cross-examine.

The Court: I think this would be a good place to adjourn. The court will adjourn until tomorrow morning at ten o'clock.

(Whereupon, a recess was taken in this cause until Wednesday, January 29, 1947, at ten o'clock a.m.) [267]

Yakima, Washington, January 29, 1947
10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Direct Examination of William S. Regan
(Continued)

By Mr. McKelvy:

Mr. McKelvy: I just have one or two questions I would like to ask.

Q. Doctor, I believe I forgot to ask you yesterday how your concern receives the Elgetol, or Elgetol "30"; how is it shipped to you?

A. In one-gallon and five-gallon cans.

Q. Are these sealed cans, or not?

A. The one-gallon cans are sealed; the five-gallon have a—well, it isn't sealed, it can be pried off.

Q. Has the California Spray-Chemical Company at any time changed the contents of the Elgetol?

A. No.

(Testimony of William S. Regan.)

Q. You do not have anything to do at all with its ingredients? A. No.

Q. And California Spray-Chemical Company does not manufacture it? A. No. [270]

Q. Now, Doctor, there was some talk about experimentation. I will ask you whether or not it is normal practice in this vicinity to experiment with a product for three to five years before it is used by the grower?

A. There are some materials that are going into use with not over one year of experimentation.

Q. Could you tell the jury what materials, by way of example?

A. Well, the new material, D.D.T., has gone into use and being recommended by certain states after not over a year of experimentation.

Q. Now, when you mention experimentation, do you mean growers' use, or not?

A. Partly grower use, but especially experimentations by the state and federal workers.

Q. Any other product that you could think of by way of example?

A. A new material known as hexaethyl tetraphosphate is going into use with only a year's experimentation.

Mr. Hawkins: Does that have a trade name?

A. It does. It has several trade names, depending upon the manufacturer.

Mr. Hawkins: Can you give us one?

A. Killex.

Q. What other trade name?

(Testimony of William S. Regan.)

A. Dapalone; those are two. [271]

Q. All the same thing, under different manufacturers?
A. Yes, so far as we know.

Q. And do you know, Doctor, whether or not states have recommended this product?

A. I know that there are states that have recommended it. I know in the case of D.D.T., Idaho recommended it very strongly; I'm referring now to D.D.T. after a year of experimentation, and West Virginia did likewise, and after two years, many states and even federal authorities are recommending D.D.T.

Q. Do you know of any damage, or is there danger of injury, by the use of D.D.T.?

A. There is very grave danger under certain conditions and certain types of use.

Q. Has there been any damage from D.D.T. in the use in the valley, that you know of?

A. I didn't quite get that.

Q. Do you know of any injury that has been suffered here in the valley from the use of this D.D.T.

A. I know that horses have been killed from mis-use of D.D.T.

Mr. Hawkins: What did you say?

A. Horses have been killed.

Q. As to orchards, do you know whether or not there is any injury occurred here in the valley?

A. Reports have indicated injury to orchard trees from D.D.T. [272]

Q. Doctor, assume that you spray when the pet-

(Testimony of William S. Regan.)

als, fifty per cent of them, have fallen; would that be a bloom spray or a calyx spray?

A. It would be a calyx spray, in the interpretation of the calyx spray.

Q. And where sprays are applied, we'll say, in the bloom, late bloom, how much time is there there without getting into the so-called calyx, ordinarily?

A. It will vary with the weather conditions. If the weather is warm it may be only a few days.

Q. I will ask you whether, in your experience and observation, whether or not it is customary to spray through the bloom and the calyx before the grower has completed his spraying in the orchard?

A. If the grower has considerable acreage he may start in the bloom period and spray right through.

Q. Now, in your opinion, Doctor, would the application of Elgetol in the bloom, late bloom, or early calyx, make any difference so far as the chance of injury to the foliage is concerned?

A. I see no difference.

Q. Would it make any difference as to whether or not there would be danger of over-thinning?

A. Yes, there could be a considerable danger, depending upon weather conditions, the pollination, vigor of the [273] trees, whether you've over-thinned or not.

Q. Well, suppose you applied it to the calyx. Would there be a danger then of over-thinning?

A. There should be less danger then, because the trees have set.

(Testimony of William S. Regan.)

Q. So that the danger you refer to from the bloom into the calyx applies to the matter of thinning, am I right?

A. Kindly repeat that.

Q. Applies to the matter of whether or not you get too much thinning; I mean the question of when you put it on might make some difference?

A. Yes, it should.

Q. Now, could it make any difference as to the chance of foliage injury? A. I can't see that.

Q. Why do you say that?

A. The foliage—there is just a matter of a few days; I can't see there would be any difference as far as foliage is concerned.

Q. Does the application of Elgetol have different effects depending on whether or not the tree is badly infected with mildew, or less, we'll say?

A. A tree badly infected with mildew is in a weakened condition.

Q. And what happens if you apply Elgetol?

A. Well, there will be more foliage injury, due to the infected area and the weaker condition of the foliage, under infection of that type.

Q. I will ask you whether or not that is true in the use of other sprays than Elgetol?

A. It is.

Q. Have you checked at all, Doctor, as to the amount of experimentation and whether or not states are recommending the D.D.T., and I've forgotten the name of the other, Killex; I believe you

(Testimony of William S. Regan.)

said; have you checked any authorities on that, publications? A. Yes, I have.

Q. And what publications did you check?

A. Well, the information is in the AIF news, and gives a summary of the reports from the different states as to what they are going to recommend this coming year, for many insects.

Q. And you checked these over last night?

A. I did.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. How long has D.D.T. been on the market, Doctor? A. Commercially, about two years.

Q. About two years; and how long has it been in use by state and federal authorities? [275]

A. About the same length of time.

Q. Wasn't it used by the Army during the war?

A. Yes.

Q. And for how long?

A. Well, I think it started, probably, around '42.

Q. D.D.T. is an insecticide, is it not?

A. Yes.

Q. It is not a fungicide? A. No.

Q. Therefore, it is unlike Elgetol?

A. As far as being a fungicide it is unlike Elgetol, yes.

Q. Yes, and this Killex, or Vapatol, that you spoke of, what is that used for?

(Testimony of William S. Regan.)

A. It is used for the control of aphids, mites, thrips, and other insects.

Q. And it is an insecticide, is that right?

A. That's right.

Q. And it is not commonly used as a fungicide, is it?

A. No, it is not known at present whether it has any fungicidal value; it may prove to have.

Q. And how old a material is that?

A. How old?

Q. Yes.

A. It was developed in Germany during the war to replace nicotine, and after our forces took over they discovered [276] this formula; I understand that our government has control of it, and is getting it out to manufacturers under some sort of a licensing program.

Q. And the German scientists had experimented with it during the war?

A. I assume that they had, yes.

Q. Yes, so that these states that you spoke of that are coming out and recommending its use now, when they do that, they're basing their judgment on more than just last year's use, is that right?

A. Yes, just as we did in the case of the Elgetol, from its use in the East.

Q. Well, we'll come to that in a few moments. Doctor, in how many states does your company do business?

Mr. McKelvy: Objected to as immaterial.

The Court: Well, I'll overrule the objection.

(Testimony of William S. Regan.)

A. We do business on the Pacific Coast and on the Eastern Atlantic Seaboard.

Q. Your company is a nation-wide company, is that right? A. That's right.

Q. And it is engaged in the business of selling spray materials? A. Yes.

Q. Of all kinds? A. That's right. [277]

Q. One of the principal items that you handle is oil, is that not right, Doctor?

A. It is, yes.

Q. Now, your company is a wholly owned subsidiary of the Standard Oil Company, is it not?

Mr. McKelvy: I object to that as wholly improper cross-examination, incompetent, irrelevant, and immaterial.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, I would like to make an offer of proof. If counsel wants it in the absence of the jury that's perfectly all right.

(Whereupon, the following proceedings were had without the presence of the jury:)

Mr. Hawkins: Your Honor, I wish to show that the fact, which I understand to be a fact, that the defendant corporation is a wholly owned subsidiary of the Standard Oil Company; the manufacturer of this Elgetol is the Standard Chemicals Company of Hoboken, New Jersey, and I want to interrogate this witness as to whether or not the manufacturer is not also a wholly owned subsidiary of the Standard Oil Company. I call your Honor's attention,

(Testimony of William S. Regan.)

for instance, to this tin in which Elgetol is furnished, which is put out by the Standard Chemicals Company of Hoboken, New Jersey; quite obviously the characteristic pattern of the Standard Oil Company. [278]

Now, I don't know what the Doctor is going to say. Counsel some time ago assured me there was no connection between the two, but I would like to have that on oath. Now, it has this bearing on the case: One of the principal items that this company sells is oil, as the witness just testified, and that, of course, is a side line of the Standard Oil Company, the selling of oil as a spray. Now, it comes to this point; the testimony that's already been introduced shows that Elgetol can be followed by an oil spray, whereas the spray of lime and sulphur cannot be followed with an oil spray for a period of sixty to ninety days, and I expect to show by this background that Dr. Regan and the California Spray-Chemical Company were keenly interested in finding a material that would permit the further sale of oil, and that they pushed this product, in fact, over-pushed it, because they felt that at last they had found something which would permit the increased sale of oil, and that's the picture I want to develop, and I think with that background the questions I am about to ask are proper.

Mr. McKelvy: We object to the offer for the reason it is entirely outside the issues as framed by the pleadings. There is no claim here that the defendant was the manufacturer, either directly or

(Testimony of William S. Regan.)

indirectly, and I think the pleadings still are supposed to be the [279] guiding thing of the issues in the case. Second, the obvious idea is to explore, from counsel's own statement. His exploration so far presumably has done him some good, bringing the Standard Oil into the case. Having admitted he is exploring, it is certainly incompetent, irrelevant and immaterial to the issues in the case. There is no claim that we had any connection whatsoever with the manufacturer.

The Court: I will sustain the objection. I think it is a little late to change the theory, if that's the purpose.

Mr. Hawkins: It is not a question of changing the theory of the case. This witness has testified on direct examination that it was the result of grower pressure that compelled them to bring in this Elgetol. That's the inference they have attempted to leave with the jury, and I'm entitled to show they had a very definite interest in selling oil, and they had a keen interest in the promotion of it, and to show they are all tied in with the Standard Oil.

The Court: If you want to show a motive in pushing sale, I have permitted you to do that. You asked and it was answered that they sell oil. I wouldn't think it would be necessary to bring in the relationship of the Standard Oil and all its subsidiaries to show they [280] sell oil and want to sell more oil.

Mr. McKelvy: I have a motion for mistrial, the

(Testimony of William S. Regan.)

question being asked; counsel asked the same question in the other trial, in front of the jury. I suppose no matter how many trials there are the same question will be asked, and I think I should have a ruling on the mistrial at this time.

The Court: All right, the motion will be denied.

Mr. McKelvy: To clear the deck, I notice in one case, the Keck case pleaded the label. That was early in the case. I move at this time to strike that defense. It isn't in that case and shouldn't be in this one.

The Court: I thought it was in both of them. You have an amended answer, I think, that brings it into the other one.

Mr. McKelvy: In any event, if they are, I'll move to strike it out of each one. I don't think it is proper.

The Court: It runs into my mind I noticed you had that defense in one and not in the other, but I think I found it in the amended pleading.

Mr. McKelvy: I'll move at this time to strike it.

The Court: The motion will be granted, as to each case in which it appears. I think that perhaps to clarify the record, the clerk has suggested that some [281] time before the conclusion of the trial you renew your motion, and apply it to the particular paragraphs of the particular affirmative defenses, so there can't be any question as to what we're doing.

Mr. McKelvy: Very well, I'll do that.

The Court: Bring in the jury.

(Testimony of William S. Regan.)

(Whereupon, the following proceedings were had within the presence of the jury:)

The Court: I might just say briefly at this time, gentlemen of the jury, that it might seem childish to you to keep going out and back all the time, but that's a thing that is necessary in a case of this kind. Trials have to be conducted according to very well established rules of evidence. If we didn't, you could sit here for weeks. We have to limit the issues according to the rules that apply here. We have you go out when we discuss points of law because it is nothing that concerns you, and we want to keep your minds free from things that are not going in, that we talk about here as to whether they should go in or not. You may proceed.

Cross-Examination of William S. Regan
(Continued)

Q. Your company, one of the principal sprays it sells is an oil spray, isn't that right, Doctor?

A. Yes.

Q. When you spray for mildew with lime and sulphur in the [282] pink and in the calyx, it is sixty to ninety days before you can follow up with an oil spray, isn't that right? A. No.

Q. How soon can you follow up with an oil spray? A. Thirty days.

Q. I believe it was testified here the other day that recommendations were from thirty to ninety days?

(Testimony of William S. Regan.)

A. Thirty days after a pink or calyx, and sixty days or more after a dormant lime-sulphur.

Q. After a dormant lime-sulphur application; now, I believe you told the growers in 1945 that if they sprayed their trees for mildew with Elgetol they could follow up with oil in their first cover, isn't that right?

A. In a period of ten days.

Q. In a period of ten days. That's the reason why you were interested in Elgetol, isn't it, Doctor?

A. It was also the reason why they were interested in Elgetol.

Q. Yes; but you were selling oil sprays?

A. Among many other materials, yes.

Q. And you're interested in doing whatever is necessary to increase the sale of oil sprays, isn't that right?

A. No, I am not.

Q. You're engaged by the company to assist in the sale of their products, aren't you? [283]

A. No, I am not. I am engaged to put out reliable information to our users.

Q. And you do that orally?

A. Sometimes.

Q. And through the Ortho News?

A. Yes.

Q. And over the telephone? I suppose you get many calls a day, don't you?

A. That's right.

Q. Particularly in the spring when the spray program starts?

A. And all through the summer.

(Testimony of William S. Regan.)

Q. And all through the summer; and you talk to a good many growers throughout the season, do you not? A. I do.

Q. In fact, would you care to estimate that you talk to about half the growers in the valley?

A. No, I don't, any such number as that.

Q. Not that number, but a pretty substantial number every season?

A. Well, a fair number.

Q. To the customers of your company?

A. Both customers and those who are seeking information, who may not be our customers.

Q. Yes. You're also engaged in working out spray programs, are you not, for various of your customers? [284] A. That's right.

Q. And you go out on the orchard with them and look the orchards over? A. Sometimes.

Q. And you work out a program for them to follow? A. Uh huh.

Q. And you give them formulas to use, isn't that right? A. Yes.

Q. And the grower has learned to look to you for advice and counsel in these matters, isn't that right, Doctor? A. I believe they do.

Q. And that was one of the reasons you were hired here, as I understand your testimony, or employed here, was to occupy that position with respect to the growers, isn't that right?

A. Primarily I was brought in to carry on research work.

(Testimony of William S. Regan.)

Q. And ultimately to assist the company in the sale of its products?

A. No—indirectly, yes.

Q. Indirectly, yes? A. Yes.

Q. Well, you were pretty enthusiastic about Elgetol, then, yourself, in 1945?

Mr. McKelvy: Object to the question as immaterial.

The Court: Well, I'll overrule the objection.

(Whereupon, the reporter read the last previous question.)

A. I was enthusiastic to the extent that growers who had used it were well pleased, almost invariably, and many growers were interested in any material that might make it possible for them to improve their codling moth control by using the most effective materials.

Q. Well, you thought you had found something that would enable the further sale of oil, isn't that right? A. That didn't follow at all.

Q. That wasn't in your mind?

A. No, it was not.

Q. You ordered the Elgetol into the Yakima Valley, didn't you?

A. I didn't get that question.

Q. You ordered the Elgetol into the Yakima Valley?

A. We ordered it at the request of growers who wanted to use the material.

Q. I see; how much Elgetol did you order, if you remember?

(Testimony of William S. Regan.)

A. I don't remember. It might have gone into several hundred gallons, or a few thousand gallons.

Q. You tried to get all you could that spring, didn't you?

A. No; we got whatever we thought the growers would require.

Q. Wasn't Elgetol pretty hard to get in the spring of '45?

A. Not according to my recollection. [286]

Q. Didn't you tell Mr. Emerson in that first telephone conversation he had with you that he had better buy it when and as he could, because it was hard to get?

A. I have no recollection whatever of talking to Mr. Emerson over the 'phone.

Q. I see; and you may have said that to him, however?

A. Well, I don't recall it.

Q. You don't recall it?

A. No.

Q. Did you ever analyze Elgetol "30"?

A. We've had it analyzed.

Q. Did you have the '45 product analyzed?

A. I believe so.

Q. And the '44 product analyzed?

A. I think so.

Q. Did you find any difference in the two?

A. No.

Mr. McKelvy: Objected to as not proper cross-examination, outside the issues of the case.

The Court: Well, he's answered. I'll let it stand.

(Testimony of William S. Regan.)

Cross-Examination

(Continued)

Q. And why did you have it analyzed?

Mr. McKelvy: Make the same objection.

The Court: Overruled. [287]

A. We often have our regular products analyzed, to see if they are up to standard.

Q. Now, as a matter of fact, in this case, Doctor, you had those two years analyzed to find out whether that was the reason it didn't work in '45?

A. We might have had 1946 analyzed too.

Q. I'm asking you about 1944 and 1945.

A. Kindly repeat your question.

Q. I say, you had those analyses made for the purpose of finding out if that was the reason all this trouble came up in '45?

A. We had them analyzed to see what the chemical composition of the material was, and whether it was up to the standard indicated on the container.

Q. There was quite a bit of damage done by Elgetol in 1945, wasn't there, Doctor?

Mr. McKelvy: I object—well——

A. Yes.

Q. And you had the 1944 and 1945 analyzed to find out if there was any difference in the two, didn't you?

A. I don't recall that was the reason. I think it was analyzed to find out whether the material was up to the formula indicated on the container. We often do that.

(Testimony of William S. Regan.)

Q. To find out if in fact this was other and different than the formula on the tin, if that was the reason it caused [288] you trouble in 1945?

A. That isn't what I stated. I stated it was analyzed to see whether the formula was up to the formula on the container.

Q. It wasn't for the purpose of fixing the blame?

The Court: I'll sustain an objection to that. He's answered that three times.

Q. Now, the analysis that you had made of the '44 product was in 1945 or 1946, was it not?

A. I believe it was in 1944.

Q. You had the 1944 product analyzed in the year 1944? A. I think so.

Q. I see; and you found no difference?

A. And the sample as analyzed in 1945 showed the identical composition.

Q. Identical composition; now, did you ever recommend to anyone that they use Elgetol as a mildew control?

A. Our position on the use of Elgetol for mildew control was based entirely as a suggestive material, on the experience of growers in '44.

Q. And that is true in all cases, I take it?

A. I think so.

Q. Now, referring to the April 17, 1945, issue of the Ortho News, this is what you said then: "Mildew has been severe during the past several years on Jonathans and some other [289] varieties of apples, with some cases of severe injury to D'Anjou and Bartlett pears and to some varieties

(Testimony of William S. Regan.)

of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulfur (2 gallons or more in 100) in the "pink," with follow-up sprays of wettable Sulfur for calyx or later sprays, if necessary. To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of Mildew and can be followed by Summer Oil in the usual ten day interval. Suggested dosage—(1) Elgetol 1½ pints in 100 gallons of water in the "pink," when buds are separated in the clusters and before the bloom opens, and (2) Elgetol ½ pint in 100 with 3 pounds of Lead Arsenate, in the calyx spray.'

Now, isn't it a fact that you told the growers that they had the choice of either the standard method or the use of Elgetol as a control?

A. I think that is stated there.

Q. Did you ever tell the growers that they were acting at their own peril when they used this product?

A. I think that any grower knew that the material had been used—

Q. Just a moment, I'd like you to answer my question. Did you tell any grower, or Mr. Emerson, Mr. Keck or Mr. [290] Stahler, that they were using this material at their own peril?

A. I told Mr. Stahler that the material was new, and he knew that it was new, and as I mentioned before, I had no conversation with Mr. Emerson until he had used it during the previous year,

(Testimony of William S. Regan.)

unknown to me, and in the pink of '45 before I knew he had used it.

Q. That's your answer to my question?

A. Yes.

Q. In other words, you did not tell Mr. Emerson that he was acting at his own peril in using it?

A. I had no occasion to contact him to tell him that.

Q. And you did not tell Mr. Stahler that?

A. I told Mr. Stahler——

Q. You just testified you told him you knew it was a new material.

A. He knew it was a new material.

Q. But you did not tell him he was acting at his own peril in using it, did you?

A. I don't use that word "peril."

Q. Do you ever say that a spray is a good spray or a bad spray?

A. Well, we usually refer to spray materials with reservations. After a good many years of experience we know that almost any spray material can cause injury under [291] certain conditions.

Q. Handing you plaintiffs' Identification G, is that your handwriting, sir?

A. I don't think that that was identified.

Q. Well, that's called plaintiffs' Identification G.

The Court: Well, you may answer the question.

Mr. McKelvy: Just answer the question, Doctor.

A. This is my handwriting, yes.

Q. Did you leave that for Mr. Stahler in the year 1945?

A. As I recall, I did.

(Testimony of William S. Regan.)

Mr. Hawkins: I will again renew my offer.

Mr. McKelvy: I object to the offer for the reason that it is not tied up at all with the issues in this case.

The Court: Let me see that again.

Mr. McKelvy: It does not refer to anything in this case.

Mr. Hawkins: The man says he always——

A. Would it be in order for me to——

The Court: Just a moment.

Mr. McKelvy: Wait till the court reads it.

The Court: I'll sustain the objection.

Mr. Hawkins: Your Honor, the witness has testified that he never makes any comment about a spray except he makes reservations, and this little note here [292] clearly contradicts that statement, and for that purpose it is admissible.

The Court: I have sustained the objection. If it is impeachment, it is collateral.

Cross-Examination

(Continued)

Q. Do the remarks that you made in that plaintiffs' Identification G refer to Elgetol, or some other spray?

A. It did not refer to Elgetol. It referred to a material that we do not sell, and that Mr. Stahler had used on his place, unknown to me.

Q. I see. Now, Doctor, when you give this advice to the growers orally and through the Ortho News, you anticipate that the growers will rely on what you say there? A. Not altogether.

(Testimony of William S. Regan.)

Q. Well, you put it out for the purpose of guiding them, don't you?

A. I put it out for the purpose of giving them the best information available at that time.

Q. You do not put it out for the purpose of assisting them, then, is that it?

A. It is for the purpose of instructing them to our best knowledge, in the use of materials.

Q. All right, then; if you put it out for the purpose of instructing them in the best use of the materials to your knowledge, you expect them to follow those instructions, [293] don't you?

Mr. McKelvy: I object to that as argumentative and repetitious.

The Court: Overruled.

Cross-Examination

(Continued)

Q. You expect them to follow those instructions, don't you, Doctor?

A. Not altogether.

Q. Well, do you expect them to disregard those instructions?

A. I expect them to use judgment.

Q. Well, now, when you say 1½ pints of Elgetol per one hundred gallons of water, you expect them to follow that formula, don't you?

A. I expect them if that suits their particular case that would be the dosage, yes.

Q. You don't expect them to use something else when you tell them 1½ to 100, do you?

Mr. McKelvy: Object to it as argumentative.

(Testimony of William S. Regan.)

The Court: I think I'll sustain the objection. It is obvious the instructions are put out to be followed.

Mr. Hawkins: I think it is obvious, too.

The Court: The jury will disregard comments either of court or counsel unless it is in evidence.

Cross-Examination

(Continued)

Q. Now, when you tell the grower to apply the spray in the pink, at what stage do you expect him to apply the spray?

A. The application of a pink spray can mean anything from the very first showing of the pink until the bloom opens.

Q. Until the bloom opens? A. Yes.

Q. And that's what you call the pink?

A. There are various stages of pink.

Q. Yes; and when you instruct a grower to apply the Elgetol in the calyx, at what stage of apple do you expect them to apply it?

A. May I use another word than instruct? I don't instruct the growers.

Q. Oh, I was just using the word that you used yourself a few minutes ago.

A. Well, the calyx spray is anywhere, this is what I consider the official calyx period, any time from fifty per cent of the blossoms fallen to seventy five per cent.

Q. What about the stage of development of the bud?

A. Stage in the development of the buds?

Q. Yes.

(Testimony of William S. Regan.)

A. Well, that is the stage, fifty to seventy five per cent of the petals fallen.

Q. Well, I've heard some testimony here that the calyx is the stage when the little apple is just formed, but [295] before the end closes up.

A. Well, the calyx period is an extended period too, depending upon weather, but as far as the spray application is concerned, they usually consider the period fifty to seventy five per cent of the petals fallen as the time to start the calyx spray.

Q. That is when the flesh is formed?

A. The what?

Q. The flesh?

A. Well, there's a little bump there.

Q. That hasn't yet closed up. That's the same as when fifty to seventy five per cent of the petals have fallen?

A. Of course, the bulb sizes up, probably, in that period.

Q. In other words, your definition of calyx is about the same as Mr. Reeves', the man from Wenatchee?

A. I think that's about the standard calyx period for the start of the calyx spray.

Q. And when you give instructions to apply a spray in the calyx you expect a grower to apply it at that stage, is that right?

A. Well, we don't as a general rule tell the grower just when to start his calyx spray. It is a well-known period, and the average grower would know when to start.

(Testimony of William S. Regan.)

Q. And that's when you expect him to start it when you tell him to apply it in the calyx spray?

A. I say, that's the expectation, that that's the time he would start it.

Q. You don't recall this telephone conversation that Mr. Emerson testified to as occurring about the second of April, 1945?

Mr. McKelvy: That's repetitious.

The Court: Sustain the objection.

Q. I wonder if you recall that part of the conversation relating to a dormant spray?

A. I have no recollection whatever.

Q. You don't recall his asking you whether Elgetol could be used as a dormant spray?

Mr. McKelvy: I object to that.

The Court: Does that refer to the telephone conversation?

Mr. Hawkins: Yes, it does.

The Court: He said he didn't remember any telephone conversation. I'll sustain the objection. If he didn't remember all of it he couldn't remember part of it.

Cross-Examination

(Continued)

Q. You receive a good many calls a day, do you not, Doctor?

A. It varies a great deal, from none at all to several.

Q. And because of the number of them it might be possible for you to have a conversation and not be able to remember it a couple of years later? [297]

A. Oh, that's a possibility.

(Testimony of William S. Regan.)

Q. Yes. Now, you say that the first time that you recall of seeing Mr. Emerson was when he came to your office and wanted you to come out to his orchards?

A. No, there was a telephone call that came into the office, that I didn't answer, and he requested that I come to his orchard.

Q. I see; and this was about the 5th of May, wasn't it?

A. I don't recall the date, but I recall the period of time in the orchard. He had just finished his pink spray.

Q. Yes. It was between the pink and the calyx stage? A. Yes.

Q. And who was with you when you went out there? A. Tom Strand.

Q. And who is he?

A. Tom Strand is in the research department of the California Spray-Chemical Corporation, located in California.

Q. And didn't Mr. Emerson complain to you of the damage that was apparent in his orchard as a result of the use of Elgetol?

A. He mentioned that there was some foliage injury beyond the normal expectation, on the mildewed tips, in the Gromore orchard, and requested that we meet him there the next day, which we did.

Q. You saw no evidence of burn at the Tieton orchard? [298]

A. I saw none other than possibly a little tip.

Q. Did you see any evidence of burn at the Gromore orchard?

(Testimony of William S. Regan.)

A. There was some indication on yellow foliage that there was some burn; other than that, in the mildew area.

Q. Now, as I recall your direct testimony, you stated that the general conversation was just about Elgetol as a thinner?

A. Well, other than this reference to the yellow foliage and the effect on that, yes.

Q. The principal part of your conversation according to your present recollection was Elgetol as a thinner? A. That's right.

Q. Mr. Emerson wanted to find out about that?

A. Yes.

Q. And there was very little damage at that time?

A. I would consider it not commercial damage.

Q. Not commercial damage? A. Yes.

Q. Then you did tell him that he still had a good crop in prospect?

A. It appeared to be; at least he said that he expected a good bloom coming up.

Q. Well, you could see the pink at that time, couldn't you? A. Yes.

Q. And didn't Mr. Emerson express alarm about using Elgetol [299] again in the calyx?

A. My recollection was that there was not any discussion of calyx. Mr. Emerson was very much concerned about a bloom thinning spray; that is, he was interested.

Q. And you think he called you out there to his

(Testimony of William S. Regan.)

Tieton place and to his Gromore place just to talk about the possible use of Elgetol as a thinner?

A. That's right.

Q. I see.

A. Other than the fact that there was a little burn on the yellow foliage that I referred to.

Q. Well, wouldn't the fact that he called you out there to look at it indicate he was worried about it?

A. I think there was a little more than the normal condition, but he didn't seem to be seriously concerned about it.

Q. Didn't you tell him to go ahead and use the Elgetol in the calyx? A. No.

Q. You have no recollection of that, Doctor?

A. No, I haven't.

Q. Did you ever tell any grower to use Elgetol in the calyx?

A. The discussion in this particular case was on bloom thinning. Why would he be using a mildew spray on Delicious and Winesaps, which are not normally susceptible [300] to mildew?

Q. They are susceptible at certain——

A. They are not. Very, very slightly.

Q. ——at certain times, under certain conditions, are they not?

A. No, they're considered non-susceptible varieties.

Q. Didn't he check with you a second time before he put on the calyx spray, and ask you again if you were sure it was the thing to use?

(Testimony of William S. Regan.)

The Court: Answer, instead of shaking your head.

A. No.

Q. Your answer is no; and is it not a fact that you told him that "we have used it back east, we have used it here, and in Wenatchee, and if it were harmful, we would know it now, and man, we wouldn't be recommending it if we didn't know it was safe"?

A. I made no such statement whatever.

Q. Now, with reference to Mr. Stahler, he invited you out to his place?

A. Mr. Stahler I believe at the outset invited me to come to his orchard.

Q. For the purpose of obtaining some information from you? A. That's right.

Q. You told him to use Elgetol in the pink, did you not? A. I didn't tell him to.

Q. On the Jons? [301]

A. No, I didn't tell him to.

Q. You told him to use it in the calyx on the Jons? A. No, I did not tell him to.

Q. What was this Exhibit F?

A. That was a discussion between us, and it was decided——

Q. What about Plaintiffs' Exhibit F, what is that?

A. It's just as I stated yesterday, that we talked it over, and he had his choice between using lime and sulphur and Elgetol, which he knew about, it was new, and he didn't want to use lime and sul-

(Testimony of William S. Regan.)

phur because it would interfere with his codling moth program, and he decided to use Elgetol, based on some observations that he made the year before.

Q. And not on your advice at all, Doctor?

A. Well, it was simply a discussion.

Q. He just drug it out of you, Doctor?

A. No, he didn't "drug" it out of me, no.

Q. All right. That is the formula that you told him to use in the calyx spray?

A. That is the formula that we discussed, and he asked me if I would write it down. I did.

Q. And that is your handwriting?

A. That's my handwriting.

Q. All right, Doctor.

(Whereupon, a one gallon tin can was marked Plaintiffs' Exhibit "J" for identification.) [302]

The Clerk: I omit "I" and use "J". It's too hard to tell the difference between them.

Cross-Examination

(Continued)

Q. This is a tin, plaintiffs' Identification J, that Elgetol comes in, one gallon size, is it not?

A. Uh huh, yes.

Q. That was the tin that was used in 1945?

A. I think that was the tin used in 1944.

Q. Any difference between the 1944 and 1945?

A. The difference in the can, the 1945 had a tight lid; that is, it wasn't the type that you could pry off.

Q. I see; otherwise it was the same?

A. Yes.

(Testimony of William S. Regan.)

Q. And I notice that it says a dormant spray for—excuse me—I will offer this in evidence.

Mr. McKelvy: We will object to it as irrelevant and immaterial. It is not at issue in this case.

The Court: I'll overrule the objection, and admit it.

(Whereupon, Plaintiffs' Exhibit "J" for identification was admitted in evidence.)

Cross-Examination

(Continued)

Q. This tin indicates that the spray is intended as a dormant spray, does it not?

A. It is stated on the container. [303]

Q. Then it also says:

"Elgetol 30, a material for dormant spraying of deciduous fruit and ornamental trees, contains no oils. Elgetol 30 should be applied during the dormant period except where late dormant is recommended."

Did that indicate anything to you, Doctor?

A. Well, it indicated to me that we have some experimenters around the country who are finding new uses for old products.

Q. And that is to say, it put you on your guard, and you thought you had better look around a bit before you sold it as a mildew control, or after the dormant period?

A. No, that wasn't indicated.

(Testimony of William S. Regan.)

Q. That wouldn't be indicated to you by that language on the tin?

A. Not after the recommendations in the east.

Q. Now, by the way, in the east the material was used as a thinner, was it not?

A. Yes, because mildew is not prevalent to any extent back there.

Q. Yes. Now, then, it also says "Provided that Elgetol 30 spray has had the opportunity to dry, rains following application do not materially reduce its effectiveness." Did that mean anything to you?

A. Exactly what it says.

Q. Did you tell any of the growers to watch out for hot [304] weather?

A. We had no knowledge at that time that weather was a factor.

Q. Did you tell any of them to watch out for cool or wet weather?

A. No, we had no knowledge of the effect of weather.

Q. And in the case of lime and sulphur you do have to watch out for hot weather, don't you?

A. For the summer sprays, hot weather is a factor that might cause extra injury.

Q. Well, oftentimes the calyx spray comes along at the end of May, doesn't it, just before the first of June?

A. Yes, it might even come in late April.

Q. And if your calyx spray comes at the end of May you might run into some pretty warm weather, mightn't you?

A. You might.

(Testimony of William S. Regan.)

Q. Well, isn't it a fact that with lime and sulphur, that lime and sulphur may burn if the weather becomes warm immediately after its application?

A. It may.

Q. On the other hand, with lime and sulphur, if the weather is cool there is little danger of burn?

A. Yes, and also little danger of doing any good.

Q. Now, I take it with Elgetol apparently it is just the reverse, isn't it, that if it is wet and cold after its [305] application, then you do have damage?

A. That proved to be the case.

Q. Yes. Now, as I understand it, your recommendations in the use of Elgetol were based on the results, primarily, obtained by growers such as we had here yesterday?

A. Technically, those were suggested suggestions, not recommendations; suggestions.

Q. Suggested suggestions?

A. No—they were suggestions.

Q. But I mean you, whatever it was you said in 1945, whether we call it a recommendation or a warranty or a suggestion——

Mr. McKelvy: You don't claim it is a warranty, do you?

Mr. Hawkins: Well, whatever you want to call it.

Mr. McKelvy: Well, let's have the question.

Q. Whatever you call it, that was based, in your mind, on the results obtained by people such as were here testifying yesterday on your behalf?

A. That's right.

(Testimony of William S. Regan.)

Q. You know that work done in one part of the country has to be checked in this locality before you can really tell what it is going to do?

A. Well, I know that it might be wise to do that, although it isn't always done, even among the experimenters.

Q. It would be wise to do that? [306]

A. Yes.

Q. Your conditions are different back east, aren't they, in a great many respects?

A. They are somewhat different.

Q. For instance, as you just testified, they're not bothered with mildew back there? A. Yes.

Q. Whereas we have it back here.

A. They had scab back there, and we don't have it here.

Q. And mildew tends to weaken the tree, does it not? A. Yes.

Q. One further thing, Doctor; I notice in your Ortho News you warn the growers not to combine Elgetol with oil, is that right?

A. The statement is there to that effect.

Q. Does that still hold true? A. Yes.

Q. I notice on the tin, however, that it says the spray may be combined with oil.

A. Well, that's the dormant application.

Q. Oh, I see, that's for the dormant application?

A. Yes.

Q. I think that's all.

(Testimony of William S. Regan.)

Redirect Examination

By Mr. McKelvy:

Q. Doctor, did you know of any work being done with Elgetol [307] in the east at the time, in 1944, we'll say, or '45?

A. There is work being done back there. In fact—do you refer to Elgetol?

Q. Yes.

A. Yes, there is work being done back there, but there's a great deal of use, that is, grower use.

Q. And some work been done by extension departments?

A. Yes.

Q. Cornell University done any work on it?

A. Yes.

Q. How many years had it been used in the east before 1944?

Mr. Hawkins: I think, your Honor, that the testimony should be directed as to whether or not this use and experimentation is in connection with use of Elgetol as thinner, or a mildew control.

The Court: I will overrule the objection.

Redirect Examination

(Continued)

Q. How many years has it been used in the east, before 1944?

A. Six years, at least.

Q. Six years. Well, you mentioned Tom Strand. Is he available now to come here to testify?

A. Mr. Strand is in Mexico, I understand, and is not available, otherwise he would be here.

(Testimony of William S. Regan.)

Q. Are you a salesman, Doctor?

A. No, I am not. [308]

Q. Do you ever try to sell the products for this company? Ever solicit?

A. I've never taken an order in my life, the book order.

Q. They have other men that act as salesmen?

A. They do, yes.

Recross-Examination

By Mr. Hawkins:

Q. Was this work that you're speaking of that is being done back east in connection with thinning?

A. I think there is work being done on not only thinning, but for disease control as well.

Mr. Hawkins: I think that's all.

Redirect Examination

By Mr. McKelvy:

Q. One other question on that, Doctor. Was the work being done during these six years of use, using Elgetol, was that put on the label referred to in Exhibit J?

A. I think there is no reference to it on that label.

(Whereupon, there being no further questions, the witness was excused.)

The Court: The court will recess for five minutes.

(Short recess.)

(All parties present as before.)

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: Mr. McKelvy, I just looked at these [309] affirmative defenses, and if you will check me with the pleadings, I think what you wish to withdraw is the second affirmative defense in each case.

Mr. McKelvy: That is correct. So the record has it clear, the defendant in each of the cases now on trial moves to withdraw the second affirmative defense, the defense setting out the label on the can containing Elgetol "30."

The Court: The motion is granted. Bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.) [310]

L. P. BATJER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name is Dr. L. P. Batjer?

A. That's right, sir.

Q. Where do you live, Doctor?

A. Wenatchee.

Q. What is your business?

A. I am a research horticulturist for the United States Department of Agriculture.

(Testimony of L. P. Batjer.)

Q. How long have you been with the United States Department of Agriculture?

A. About twelve years.

Q. Would you give us something of your preparation and education in your particular line?

A. Well, I was reared on a fruit farm in the middle west. I went to the University of Texas and Missouri, took graduate work at Michigan State, and took a Doctor's degree at Cornell University in New York State. Following that I was horticulturist with New York State and with West Virginia State.

Q. Speak a little louder, please. [314]

A. I was horticulturist with New York State for three years, following the completion of my work, and I was horticulturist for two years with the West Virginia experiment station, and following that I went with the United States Department of Agriculture and was stationed at Beltsville, Maryland, which is their eastern or national headquarters.

Q. Are you familiar with Elgetol?

A. Yes.

Q. Do you know whether Elgetol had been used in the east as a thinner prior to 1944?

A. Yes.

Q. How long had it been used in the east prior to 1944?

A. Experimentally it was used in 1940, I believe, and some commercial use followed that in 1941. In 1942 and 1943 there was, I would say, considerable commercial use on certain varieties.

(Testimony of L. P. Batjer.)

Q. Had some work been done on Elgetol at Cornell University under Dr. Hoffman's supervision? A. Yes.

Q. When did you come to Wenatchee, Doctor?

A. In March of 1945.

Q. Have you had occasion to work with Elgetol since being in Wenatchee? A. Yes. [315]

Q. Incidentally, I take it in your work you get over here in the Yakima Valley, too, do you, some?

A. Yes.

Q. What type of work have you done with Elgetol?

A. Our work has primarily been, or entirely, I should say, with the use of Elgetol to thin the crop during the bloom stage.

Q. And when do you apply the Elgetol? What period during the bloom stage?

A. We apply it principally as a blossom spray, being applied at when an occasional petal would fall, from the earliest opening bloom.

Q. Have you applied it into the so-called calyx, when fifty per cent of the bloom has fallen?

A. With some varieties we have. We've done it with Jonathan and golden Delicious when perhaps fifty per cent of the petals were down.

Q. Have you received any injury to the foliage, any commercial damage, so-called, by the use of Elgetol? A. None whatever.

Q. What are the limits, so far as the mixture is concerned, that you follow?

A. The concentration?

Q. Yes.

(Testimony of L. P. Batjer.)

A. I would say it is within the range of one pint to one [316] quart per hundred gallons.

Q. In other words, you have used this in between there? A. Yes.

Q. Doctor—let me ask you first, so that it will be clear; did you receive any injury at any time when you used the mix that is one quart per hundred gallons?

A. No; by injury, when you say injury, I should qualify that, perhaps. We do get the burning of petals, which is a characteristic of the spray, and then occasionally we may get a slight mottling, it looks like a mottling effect on some of the leaves, particularly on the inside portion of the tree. It is not any more injury than you would get, I should say, with many other spray materials, and certainly not of commercial significance.

Q. Doctor, assuming you would put on Elgetol on, we'll say, a Jonathan tree, because I guess they have the mildew most, that is pretty badly infected, for the purpose of controlling mildew. Would it make any difference as to the results or effect whether or not that was a tree without mildew, or one badly infected with it, in your opinion?

A. Are you speaking from the standpoint of thinning? Would it make any difference how much thinning you would get?

Q. No, the standpoint of mildew control.

A. Well, I would say that you could get more injury with a [317] seriously infected tree if it were sprayed with Elgetol; you perhaps would.

(Testimony of L. P. Batjer.)

Q. And why would you say that?

A. Well, a seriously infected mildewed tree is a sick tree, in a sense. The foliage is certainly not normal, and you get, we think, but haven't measured it experimentally, we get more absorption of the spray material through a diseased tissue as contrasted with a healthy tissue.

Q. Now, so far as the thinner is concerned, does the application of Elgetol kill the so-called bud, or does it cause it not to pollenize?

A. It prevents it from setting, after pollination takes place, by either killing the pollen, or killing the entry that the pollen has to the vital part of the flower, that is necessary for fruit set to take place. It kills it in two ways, and then perhaps another important effect is shock, that is, temporarily causing the tree to not function normally, and indirectly affecting set in that way.

Q. Doctor, what would you say as to whether or not the chance of foliage injury is any different whether the Elgetol is applied in the calyx or in the full bloom?

A. On foliage injury?

Q. Yes, sir. [318]

A. Well, I would say that we haven't gotten, as I said before, we haven't gotten any injury applied in either stage. I would think that the amount of injury that one would get might depend more on the weather following than on differences in time.

Q. I see.

Mr. McKelvy: You may cross-examine.

(Testimony of L. P. Batjer.)

Cross-Examination

By Mr. Hawkins:

Q. Did you do any work with Elgetol as a mildew control, Doctor?

A. That was only incidental, with observations only. Our primary objective was thinning.

Q. You did not work with Mr. Reeves in his experiments with Elgetol as a chemical preventative of mildew? A. No.

Q. You say that Elgetol shocks the tree. What do you mean by that?

A. Well, that's a term that isn't easily defined. We probably use it loosely. In other words, we seem to get more fruit set on a tree sprayed with Elgetol than we can account for by the failure of the blossoms to become pollinated. We let enough time elapse so that we are fairly sure that pollination has pretty well taken place with all flowers. We still get some thinning, and we can't account for it in any other way [319] except to perhaps call it general shock, whatever that is; it is a very loose term, I will admit.

Q. Well, I was wondering if this extra thinning that you're speaking of is due to the burning action of the Elgetol on the tree?

A. Well, if it is a burning action, I would say that it's been invisible, that is, we can't see it, and so in that sense it would not be a burning, no.

Q. Yes, but if there is no evidence of burn, and yet it causes more thinning, then you would expect——

(Testimony of L. P. Batjer.)

A. Well, then, we would expect, from the standpoint of its action as a pollicide, or killing the pollen, but I should make it clear then that in all of our work here in the west we haven't overthinned any trees, so our thinning is not really adequate enough; it usually has to be supplemented with hand thinning.

Q. Does your work involve diseases such as mildew? A. No.

Q. What is the name that you ascribe to that type of work?

A. Well, that would come—primarily a pathologist problem.

Q. A plant pathologist deals with mildew and so forth?

A. Deals with diseases of the plants.

Q. And your type of work is called what?

A. Called what?

Q. Yes, what is it called? [321]

A. Well, physiological investigations, or there is a very indefinite line of distinction between the two; one blends into the other, but mainly we work on problems that do not pertain to diseases, though we may work cooperatively with another person who is a pathologist, and sometimes our work is closely connected.

Q. Well, when you applied the Elgetol or had it applied in these experiments that you were running, you applied it in the full bloom stage, or very shortly after?

A. At the full bloom stage, and in many cases

(Testimony of L. P. Batjer.)

where we were spraying Golden Delicious and Jonathans this year, we would put on another spray in the early stage in the calyx.

Q. In the early stage; but you have in your experiments applied no pink spray, is that right?

A. No pink spray, no.

Q. And you have applied no true calyx spray?

A. Well, I would say if you accept the definition of calyx as when fifty per cent of the petals are down, we have applied some in the true calyx, but on the early end of it. In fact, when we sprayed our Jonathans in the past season the grower put on his calyx spray on those same trees an hour after we sprayed, so he was actually engaged in his calyx spray that day.

Mr. Hawkins: That's all. [322]

Mr. McKelvy: That's all. You may be excused; I guess there is no objection [392].

(Whereupon, there being no further questions, the witness was excused.)

ELMER MILAND

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Elmer Miland.

Q. And where do you live, Mr. Miland?

A. On Smith View, six miles west.

(Testimony of Elmer Miland.)

Q. Six miles west of Yakima? A. Yes, sir.

Q. And what is your occupation, sir?

A. Fruit grower.

Q. And how long have you been engaged in that business?

A. All of my life, since I was old enough to.

Q. I beg pardon? [357]

A. All my life since I was old enough to; I was raised in fruit.

Q. You own your own orchard now?

A. Yes.

Q. And how long have you owned that place?

A. This place, since '32.

Q. What do you have this place planted to?

A. Well, there's Jons, Romes, and Winesaps.

Q. Do you have a mildew problem in this orchard? A. Yes, I do.

Q. In all varieties?

A. Not in the Saps so much; I have it just a little in that. I have quite a lot in the Romes and quite a lot in the Jons.

Q. What do you ordinarily use to control mildew?

A. Well, lime and sulphur has always been the old reliable stand-by, always been used.

Q. And at what stage of the bloom do you apply lime and sulphur?

A. Well, it's in the pink and calyx. Some follow on through into the first cover with lime and sulphur.

Q. Have you ever used Elgetol?

A. I used it in '45.

(Testimony of Elmer Miland.)

Q. For mildew? A. Yes, sir. [358]

Q. Have you ever used Elgetol as a thinner?

A. No.

Q. What strength of Elgetol did you use in your mildew control in 1945?

A. Well, I used a pint and a half in the pink, and half a pint in the calyx.

Q. You applied two sprays, one in the pink and one in the calyx, is that right?

A. Yes; there's about twelve trees on the end of the place that I just put on the one spray, a calyx spray.

Q. And what effect did Elgetol have on your orchard, Mr. Miland? A. Well, it burned it.

Q. What effect did it have on your crop in 1945?

A. I didn't have any Jonathans, and I forget the figures, but I think less than half of Romes.

Q. Did you spray your Winesaps with Elgetol?

A. No.

Q. Did you have a good crop of Winesaps in 1945?

A. Yes, I think so. I can't just remember what I had that year.

Q. You said that the Elgetol burned the orchard. Would you describe to the jury what you mean by that?

A. Well, they turned them brown, and they just died and fell off, and the fruit itself, the stems, turned yellow, [359] and the fruit dropped off.

(Whereupon, a photograph was marked Plaintiffs' Exhibit "K" for identification.)

(Testimony of Elmer Miland.)

(Whereupon, a photograph was marked Plaintiffs' Exhibit "L" for identification.)

Direct Examination

(Continued)

Q. Mr. Miland, I am handing you plaintiffs' identification L. Will you state what that is? Is that a photograph? A. Yes.

Q. Of what?

A. That's one Jonathan tree that I didn't spray with Elgetol.

Q. Either in the pink or in the calyx?

A. No; no spray at all.

Q. No spray at all; and I am handing you plaintiffs' identification K. Will you state what that is?

A. That's a tree in the middle of the orchard, average tree, that was sprayed.

Q. That's a photograph of a tree?

A. That's right.

Q. And is that picture typical of the trees on your orchard sprayed with Elgetol? A. Yes.

Q. And plaintiffs' identification L is typical of the trees in your orchard not sprayed with Elgetol, is that right? A. Yes, that's right. [360]

Mr. Hawkins: I will offer plaintiffs' identification K and plaintiffs' identification L in evidence.

Mr. McKelvy: We object to the offer of each exhibit for the reason it is collateral matter. It is not rebuttal testimony, and is not relevant to the issues here between these parties at this time.

(Testimony of Elmer Miland.)

The Court: Was there any mention of when those were taken, Mr. Hawkins, approximately?

Direct Examination

(Continued)

Q. Can you state approximately when plaintiffs' identification K was taken?

A. Yes, just a few days before harvest.

Q. A few days before harvest? A. Yes.

Q. And when was plaintiffs' identification L taken? A. Same day.

The Court: 1945? A. Yes.

Mr. McKelvy: A further objection, that a photograph in this part of the country would not necessarily have any probative value as to the conditions in some other part of the valley, having in mind your Honor stopped me ten miles away.

The Court: It is in the area. They will be admitted for the purpose of illustrating the testimony.

(Whereupon, Plaintiffs' Exhibit K for identification was admitted in evidence.)

(Whereupon, Plaintiffs' Exhibit L for identification was admitted in evidence.)

Mr. Hawkins: The one in my left hand is the tree that has been sprayed with Elgetol, and the one in my right hand is the tree that has not been sprayed with Elgetol. You may cross-examine.

Mr. McKelvy: Should I go ahead, or wait until the jury has looked at the pictures?

(Testimony of Elmer Miland.)

The Court: Well, I think perhaps you had better wait until they have looked at them.

A Juror: Is this the same kind of a tree?

Witness: Yes, sir.

The Court: Are those both Jonathan trees?

Witness: Yes, they are.

Mr. Hawkins: Those pictures were taken at the same time, were they not?

Witness: Yes, sir.

A Juror: Are these two trees in approximately the same section of the orchard?

The Court: Just a moment; ask the Court the questions.

A Juror: I want to know if these two trees are approximately in the same section of the orchard.

The Court: How far apart were the trees?

Witness: I can look that up here. Let's see, that one was number 1; that's the second tree in the first row; that would be the west row, second tree in the west row. That would be the first row of the Jonathans. Number 4 in the ninth tree in the third row; that would be seven trees away, or approximately.

The Court: Can you connect these numbers up with your exhibit here, Mr. Hawkins? Do you know which is which?

The Clerk: Number 1 is L.

The Court: You can wait until they get through. It's just a matter of fixing it for the record.

(Testimony of Elmer Miland.)

Mr. Hawkins: The picture you have just referred to as number 1 is plaintiffs' Exhibit L, is that right?

Witness: Yes.

Mr. Hawkins: And the picture you just referred to as Number 4 is plaintiffs' Exhibit K?

Witness: Yes.

The Court: You may cross examine, Mr. McKelvy.

Cross-Examination

By Mr. McKelvy:

Q. You knew that Elgetol was a new product in the valley? A. New?

Q. Yes, new, n-e-w?

A. There might be two answers to that question. [363]

Q. Well, you only made one answer to it at the other trial; that's what I'm getting at. What is your answer?

A. Well, it is a new product.

Q. Sir? A. It is a new product.

Q. And you knew that it had been used in the valley the year before only, didn't you?

A. I had heard it had.

Q. Pardon? A. I had heard it had.

Q. And you knew it had been used as a thinner in '44? A. Yes.

Q. And you knew that when it was used as a thinner it was noticed that it controlled mildew satisfactorily in 1944?

(Testimony of Elmer Miland.)

A. That's what I was told.

Q. All right; was there any reason that you wanted to use something besides lime and sulphur for mildew control in 1945?

A. Yes, I wanted to follow up with summer oil sooner; start the season with oil sooner.

Q. Now, the photographs you have taken, you mentioned one of them is on the west row. Would that be on the outside row?

A. No, that's the inside row. The Jonathans are on the edge of my place, and this number 1 was taken on the first [364] row.

Q. Well, would there be a row of trees on each side of that tree?

A. Of Jonathans, on three sides of it.

Q. Well, we'll get them here, and know what we're talking about. Take Exhibit L. That's the one you say was not sprayed?

A. Yes.

Q. Now, are there trees on three sides of that?

A. Jonathans.

Q. And how about the other one, Exhibit K?

A. That was Jonathans on all sides of that.

Q. Jonathans on all sides of that. What would be the comparative age of the two trees in L and K?

A. Same age.

Q. One of them is a much larger tree than the other, isn't that correct?

A. I don't think so.

Q. Did you take these pictures?

A. No, I didn't.

Q. Doesn't K show a much larger tree than L?

(Testimony of Elmer Miland.)

A. It may be, the way it was taken. I don't think that there's very much difference in the size of the trees. They're all the same age.

Q. Did you spray the tree that is shown here in K, the one [365] you say you used Elgetol on, during the balance of the season, after you used Elgetol on it? A. No.

Q. In other words, after you used this calyx, you let it go to the bugs and worms, isn't that right?

A. I started the first cover, and was blowing the apples off the trees, so I decided it was time to quit.

Q. And how many sprays did you put on "L" after? A. You mean lead sprays?

Q. Any kind of sprays?

A. I think about four leads.

Q. Or anything else? A. That's all.

Q. In other words, you followed through and took care of the tree in "L" the whole season, but you abandoned one in "K" that you say you used Elgetol on, after you saw it wasn't going to have a crop?

A. You can't do that in an orchard.

Q. You didn't spray it any more?

A. I didn't spray it, no. I irrigated.

Q. You didn't spray any more? A. No.

Q. Now, if you stopped spraying a tree, whether you used Elgetol on it or not, in the calyx, and didn't use any more sprays during the season, it would make a little [366] different looking tree by harvest time?

A. It should look better.

(Testimony of Elmer Miland.)

Q. It would be different, anyway?

A. Might.

Q. Might? A. Might look better.

Q. Might look better, but wouldn't look worse?

A. I wouldn't think so.

Q. But you would expect them to show different kind of pictures, wouldn't you, at harvest time?

A. I say, it might look better if it was not sprayed and hadn't been sprayed with Elgetol.

Q. Now, who picked the two trees to take pictures of?

A. The photographer and another gentleman here in town.

Q. Well, were you there? A. Yes.

Q. Did you have anything to do with it?

A. No.

Q. Not a thing?

A. No; I followed along and let them pick the trees and take the pictures.

Q. Was the fellow with the photographer interested in the matter? A. Yes.

Q. Did you pick somewhat extremes, in order to get a comparison, [367] or a radical comparison?

A. No; we took nine photographs altogether.

Q. Now, when you applied the first spray in the pink, did you notice what you thought was a burn or damage before you started putting the calyx on?

A. Yes.

Q. You did. Did you go clear through all of your trees, then after that, with the calyx?

A. Yes.

Mr. McKelvy: That's all.

(Testimony of Elmer Miland.)

Redirect Examination

By Mr. Hawkins:

Q. What prompted you to go ahead with the calyx spray after you noticed burns in the pink?

A. I was advised to do it.

Mr. McKelvy: Just a minute. As to what conversation was had, the court has ruled that on counsel's objection it can't go, so it surely still upholds.

Mr. Hawkins: Counsel has certainly opened the door. He's left the inference that this man foolishly went ahead and sprayed, and he said he was advised to do it.

The Court: He said he was advised to do it. Now, let's let it go at that.

Mr. Hawkins: That's all. [368]

Recross-Examination

By Mr. McKelvy:

Q. Oh, I just want to ask one more question, that's all. You have a suit pending against California Spray-Chemical Corporation at the present time that hasn't been tried, haven't you?

A. That's right.

Redirect Examination

By Mr. Hawkins:

Q. And Mr. McKelvy is defending that suit, isn't he? A. I don't know.

Mr. McKelvy: I hope I will be hired, but I don't know; I may lose my job after this one.

(Whereupon, there being no further questions, the witness was excused.)

H. K. STAHLER

one of the plaintiffs, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Mr. Stahler, Dr. Regan testified this morning, or perhaps it was yesterday afternoon, that he advised you to spray the two rows of Saps alongside the Jonathans in your orchard to control the mildew, and that he did not tell you to spray any of the other Winesaps. What do you have to say about that?

A. Well, he told me to spray the two rows by the Jonathans for a precaution so that the mildew wouldn't spread any further, and then he was out there with another man on a Wednesday, and I asked him about spraying those old trees for thinner, and he said you had about two or three days to wait yet, and I asked him how long it took to do that job, and he said about two days. He said that will bring you about Saturday and Sunday, and he says "You don't want to spray on Sunday"; that's the reason I remember, because we were joking about it, so I sprayed them Saturday. [379] Sunday we didn't spray.

Mr. Hawkins: You may cross examine.

(Testimony of H. K. Stahler.)

Cross-Examination

By Mr. McKelvy:

Q. You sprayed them Saturday for a thinner?

A. Yes, sir.

Q. That's the Winesaps?

A. That's the Winesaps.

Q. Other than the two rows?

A. Other than the two rows?

Q. And applied it to them to get a thin?

A. Yes.

Mr. McKelvy: That's all.

(Whereupon, there being no further questions, the witness was excused.

E. A. EMERSON

one of the plaintiffs, recalled as a witness in his own behalf, in rebuttal, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Dr. Regan testified that when he was on your Gromore place he called your attention to an iron deficiency and that that was causing your leaves to turn yellow. What do you have to say about that, Mr. Emerson?

A. The conversation that we had about any deficiency was about a zinc deficiency; this Mr. Stroud, I believe was the name of the party with him——

(Testimony of E. A. Emerson.)

Q. Strand? [380]

A. Strand, correct——

Mr. McKelvy: Well, I don't know what he's going to say, but I think the question should be answered so I can object. This is rebuttal, after all.

The Court: Perhaps you had better ask it again.

Direct Examination

(Continued)

Q. The question I asked was what he had to say about Dr. Regan's testimony concerning the iron deficiency.

A. There was nothing said about iron deficiency.

Q. Was anything said about any deficiency?

A. Yes.

Q. What was that?

Mr. McKelvy: I object to that as not rebuttal testimony; part of the case in chief. It's been covered.

The Court: Overruled.

Direct Examination

(Continued)

Q. You may answer.

A. During the conversation the remark was made by one or the other of the gentlemen——

Mr. McKelvy: Now, I object to that, because it certainly would be new matter, as to anything Mr. Strand may have said. There's no claim here in the case in chief that Strand said anything.

(Testimony of E. A. Emerson.)

The Court: This was in the presence of Dr. Regan?

Mr. McKelvy: Yes, but it's rebuttal. Now, it [381] couldn't possibly be rebuttal, when we didn't bring out anything about what Strand said to anybody.

The Court: I think it pertains to the same matter. You may answer that; I'll overrule the objection.

Direct Examination

(Continued)

Q. You may go ahead.

A. Begin where I quit?

The Court: Yes.

A. The remark was made that there seemed to be a zinc deficiency in the trees, causing a yellowing of the trees generally, or the foliage on the trees. That was referred to as a possible cause of the severe burn that the trees showed, or that the foliage on the trees showed, and that the blossoms showed, and I asked, directing my remarks to either or both, if there was anything that they had they could recommend to overcome that deficiency, and they said that some summer zinc spray such as Delmo-Z could be applied in a first cover spray that would probably give me some—give me the desired results; that that spray should be used in the first cover, and not in the calyx. Before they answered that question I asked them if that should be applied in my next spray, or the calyx spray, and they agreed

(Testimony of E. A. Emerson.)

that I should use the Elgetol in the calyx spray, which would have been, which was my next spray to apply, to be [382] applied within a very few days, and on the first cover spray following the calyx, to use the Delmo-Z, in my first lead cover spray.

Q. Referring to the yellow condition of the leaves, what was their condition prior to the application of the pink Elgetol spray?

Mr. McKelvy: Object to that as not rebuttal. After all, the season was moving along, too. You're raising a new issue here.

The Court: Overruled.

A. So far as I could tell, there was a normal condition so far as the color of the leaves were concerned, before any application of any spray was applied.

Q. By the way, the leaves come out first, before the blossoms do, on an apple tree? A. Yes.

Q. So that you have a chance to observe those, in fact, before the blossoms come out?

A. That's right; that's the idea in applying a pink spray. The blossom pod or cluster is enclosed within the leaves. The leaves open up first, and have to be exposed all around this blossom and also in the terminal growth before there is any pink that can show up in the blossom part. The leaves were normal so far as I could determine. [383]

Q. As to color? A. As to color.

Q. And what did you observe as to the color of the leaves after the first Elgetol application?

A. Well, there was a general yellowing of the foliage.

(Testimony of E. A. Emerson)

Q. Now, Dr. Regan has testified that one of the principal items that you three folks talked about was bloom thinning. What do you have to say about that?

A. Dr. Regan and I never discussed bloom thinning. I've never at any time been interested in bloom thinning. My——

Mr. McKelvy: I think the question's been answered.

The Court: Yes, that's right.

Direct Examination

(Continued)

Q. Dr. Regan testified that he saw you out at your Tieton and Gromore places, and then he saw you once more later in the year, down at his office. Now, how many times have you talked with Dr. Regan?

Mr. McKelvy: Well, that's not rebuttal. He may have talked with him a lot of times in 1946 and 1947.

Mr. Hawkins: In the year 1945.

The Court: I'll overrule the objection. I think he's testified to that before, but go ahead.

A. I really don't have a record of the number of times that [384] I have talked with Dr. Regan. I can think of or determine as many as five times that I talked with him personally in the spring of 1945, and I talked with him once by telephone.

Q. Now, Dr. Regan testified that you invited him out to your place, your orchard, to discuss the mat-

(Testimony of E. A. Emerson.)

ter of bloom thinning. Is that right? Go ahead and answer.

A. No, it isn't right.

Q. All right; Dr. Regan testified that no one would have used a mildew control on Winesaps or Delicious. Is that true in your orchard?

A. In my orchard I had mildew on all varieties of apples to some extent. It was worse in Jonathans. The planting in the orchard is a row of Jonathans and a row of Winesaps, with an occasional Delicious through the planting in a good portion of it, and my experience has been, the learning I've had with mildew, is that mildew will work on any of those varieties that I have. It seems to work more or thrive better on Jonathan than any other varieties that I have, but there's more or less in Delicious, Winesaps, even Bartlett pears.

Q. Have you sprayed your Winesaps and Delicious for mildew at any other time than 1945?

A. I sprayed in 1944, along late in the summer. That was the intention of the spray, was my idea, was to check [385] mildew.

Q. I mean have you made any other applications other than Elgetol for mildew control?

A. I have since 1945. Before that I never had really applied a mildew control of any spray as it was really recommended, or with that in mind, because I didn't feel that my problem was serious enough to go to the expense of a pink spray and a calyx spray on my home orchard.

Q. And that applied to your Jons as well as the other varieties?

(Testimony of E. A. Emerson.)

A. Yes; that's true. May I verify that.

Q. Since 1945 have you applied any mildew control?

A. I used lime and sulphur in 1946.

Q. On all varieties?

A. On Jonathans, in two sprays, and quite a few of the other varieties in one spray.

Mr. Hawkins: I think that's all. You may cross examine.

Mr. McKelvy: No questions.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Hawkins: The plaintiff again rests, your Honor.

The Court: The court will take a ten minute [386] recess before proceeding further.

(Short recess.)

(All parties present as before.)

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: I'm not sure that I waited for you to rest, Mr. McKelvy.

Mr. McKelvy: I have just a little bit; it will only take a few minutes, a couple of minutes, probably.

The Court: All right, call in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

WILLIAM S. REGAN

recalled as a witness on behalf of the defendant, in sur-rebuttal, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Dr. Regan, is zinc a remedy for chlorosis?

A. Zinc is not a standard remedy for chlorosis.

Q. And I believe chlorosis, you said, was the yellow leaf you saw, yellow leaf condition?

A. Yellow leaf condition.

Q. About calyx time, are there certain leaves that are yellow, that is normal?

A. In the early season, what we call the primary leaves, later they don't go to full development, they are retarded in growth and turn yellow and finally drop off. [387].

If a Jonathan tree is not sprayed after the spray in the calyx, I believe you heard testimony about the Miland tree, and pictures there, what ordinarily would happen to the tree? What would it look like, compared to a tree that is sprayed during the season, at harvest time?

A. Our experience has been that an unsprayed tree becomes very shabby by fall, due to mite infestation. If you have young trees in among your regularly sprayed trees, and you don't spray them, by fall they look pretty shabby.

Q. Does the fact that a crop is hanging on one tree, and there is no crop on another tree, make the two trees appear different in any way?

A. Yes, they appear quite different in appearances.

(Testimony of William S. Regan.)

Q. How? What do you mean?

A. Well, the tree without a crop sort of clusters up and grows up straight, and the tree with a crop hangs down and looks fuller.

Mr. McKelvy: That's all.

Mr. Hawkins: No questions.

(There being no further questions, the witness was excused.)

Mr. McKelvy: The defendant rests.

The Court: The jury will retire. [388]

(Whereupon, the following proceedings were had without the presence of the jury.)

Mr. McKelvy: Comes now the defendant in each of the cases now on trial, all parties having rested, and at this time renews its challenge to the legal sufficiency of the evidence in each of the cases, and respectfully asks the court to direct the jury to return a verdict in favor of the defendant in each case as a matter of law, on the same grounds assigned at the time of the challenge and the motion for non-suit at the close of the plaintiffs' case, and on the further grounds that as the evidence now stands, all being in, it appears that the plaintiffs are guilty of contributory negligence or assumption of risk, which I conceive to be the same thing, according to the holdings, in that this product was used in apparently many different ways. We have the further fact that the plaintiffs here purchased the Elgetol in a sealed can or container, and neces-

sarily knew that the use they were making of the product was beyond the label on the container, because they would be presumed to—well, I guess the evidence shows that there isn't much dispute about it; the further ground that the plaintiffs have failed to show with reasonable certainty that the use of Elgetol in this case was the proximate cause of the damage they complain [389] of, and further, that the plaintiffs have failed to prove their damages in each case to that degree required by the law, namely, with a reasonable certainty.

(Whereupon, Mr. McKelvy addressed the Court in support of his motions on behalf of the defendant, and Mr. Hawkins addressed the Court in opposition to the motions of the defendant.)

The Court: One of the reasons that the court deferred making at least a final ruling on this very troublesome question is because I wanted additional time to re-examine these cases and read the cases and study the cases cited by the plaintiffs. As Mr. Hawkins has pointed out, without question there are distinguishing points in fact between this case and the cases that have been decided by the Supreme Court of this state in cases similar to this. There isn't any case on all fours, it's true, and you rarely get such cases, but I think as I read them, the cases of the Supreme Court beginning with the Mazzetti case, decided by Judge Chadwick, do lay down a very easily followed rule with reference to cases of this kind, where someone who purchases

an article for use is damaged by reason of its use, but has not made the purchase from the person from whom he seeks to recover; in other words, where there is no sale or no privity between the one who is [390] injured and the one from whom he seeks to recover for his injuries.

The principle that was announced in the Mazzetti case, and that case has been followed since that time, was that in circumstances such as this case a manufacturer or distributor will not be liable to anyone except his immediate vendee. That is the general rule. In other words, for a person to recover on implied or expressed warranty that the article is suitable for the purpose intended, there must be direct relationship or privity between the two, else there can be no recovery; then Judge Chadwick in the Mazzetti case sets out what are the exceptions, and those exceptions have been the basis for the subsequent cases that have been decided, and have been cited and discussed here.

Generally speaking, in order to recover where there is no privity, there must be fraud or deceit or there must be an article imminently dangerous, either imminently dangerous or an article made dangerous by reason of faulty construction. There must be either fraud or deceit, it must be an article imminently dangerous, or negligence with respect to an article not imminently dangerous, either in faulty construction or in the method of sale.

Now, the line of distinction, it seems to me [391] in principle and reasoning if not directly in holding, between the Washington cases and the cases

upon which plaintiff relies, is that when the Washington State Supreme Court talks of articles imminently dangerous, or made so by faulty construction or negligence, they are talking about a danger to human life or limb, a menace to human safety, and they limit the rule, or have never extended it beyond that, and the very reasoning upon which the cases are based indicates that it would not be further extended.

There is a special exception for those cases, for the reason they are different, they involve human safety; a matter of public policy is involved. That's what Judge Grady is talking about so extensively in his opinion in the Cochran vs. McDonald case. The DuPont vs. Beriden and Ebers vs. General Chemical Company cases go on and extend that to articles dangerous to property. In doing so, however, they discuss the same questions and cite the same cases that, generally speaking, the Washington State Supreme Court does, but they just simply take a different position on the question. They begin by saying the question is whether or not a vendor or manufacturer of articles is liable to a third person with whom he has no contractual relations for negligence in the manufacture or sale of the article, [392] but in the Ebers case, which cites and relies upon the DuPont case, the court points out that it does not make much difference, really, whether you call this the exceptions, with which the court is dealing, an exception to the implied warranty rule, or the negligence rule, because they say that after all, negligence and implied

warranty are practically the same thing as they are dealing with it there.

In other words, I think that the Supreme Court of our state, as I recall, Judge Chadwick expressly said in the Mazzetti case that in these circumstances there can only be recovery for express or implied warranty, and only recovery if there is no privity under these exceptions, which he states, and the court in its subsequent holdings has foreclosed this type of actions, it seems to me, in its reasoning in applying and construing those exceptions.

I have, I won't say with reluctance, but with considerable hesitance, and only after very careful consideration, come to this conclusion. I think it is, however, the court's duty to apply the law as he finds it, and of course there is no question but what I am bound by the law of the State of Washington. The motions for directed verdict in each case will be granted.

Mr. Hawkins: The plaintiffs, of course, will be allowed an exception in both cases?

The Court: Yes, of course. You may bring in the jury.

The Clerk: Mr. Hawkins, to clear the record, you have not offered identifications D or E. I assume you want to withdraw them.

Mr. Hawkins: I'm not certain which they are. Yes, I will withdraw the offers of D and E, your Honor.

The Court: All right. The record will show that.

(Whereupon, the following proceedings were had within the presence of the jury.)

The Court: Gentlemen of the jury, I have relieved you of the responsibility of making a determination in this case, as the court has decided as a matter of law that the case must be decided in favor of the defendant here. As you know from serving on juries before, the function of the jury is to pass upon the facts; the function and responsibility of the court is to pass upon the law, and the court has come to the conclusion that under the law that applies in this case, assuming the facts to be as claimed by the plaintiffs, they are not entitled to recover, and I am going to appoint Mr. Shattuck as foreman of the jury and ask him just as a matter of form to sign these verdicts for the defendant. The procedure is what is known as the court [394] directing a verdict.

(Whereupon the foreman signed a verdict for the defendant in each of the cases now on trial.)

The Court: The verdicts will be received and filed, and the jury will be excused until tomorrow morning at ten o'clock. [395]

Yakima, Washington, March 7, 1947

RULING OF THE COURT ON PLAINTIFFS' MOTIONS FOR NEW TRIAL

The Court: I might say that the court went into this very thoroughly at the time of the trial, and made exhaustive independent examination of the cases. It is a question that I considered of considerable difficulty, however, I became convinced from an analysis of the cases that in an action such as this, where a purchaser of an article sues for damages by reason of injuries suffered in the use of it, that he must, under the Mazzetti case, which I think has never been overruled and has been subsequently followed, he must bring an action in the nature of an implied warranty action. It isn't based directly on contract, of course, because there is no direct contract between the parties, but there must be privity, and the purchaser must sue his immediate vendor and his immediate vendor only unless he comes within one of the three exceptions enumerated. I think the Supreme Court, as I view it, has indicated this case does not come within one of the three exceptions. I'll deny the motion for a new trial, and allow an exception, of course, to the plaintiffs. [396]

Mr. Hawkins: Is that required, to ask for an exception, your Honor? I assumed not.

The Court: I think not.

Mr. McKelvy: I have one in the formal order.

Mr. Hawkins: Mr. McKelvy, I wonder if we can stipulate into the record, these two cases were con-

solidated for the purpose of trial, and counsel, will you stipulate with me in the record that these two cases may be and are hereby consolidated for the purpose of appeal?

Mr. McKelvy: Yes, I will so stipulate. [397]

REPORTER'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify:

That I am the regularly appointed, qualified and acting official court reporter of the District Court of the United States in and for the Eastern District of Washington. That as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Honorable Sam M. Driver, Judge of the District Court of the United States for the Eastern District of Washington, held on January 27, 28, and 29, 1947, at Yakima, Washington.

That the above and foregoing, consisting of three volumes, with pages numbered from 1 to 375, inclusive, contains a full, true and accurate transcript of the proceedings had therein, including all objections and the court's rulings thereon.

Dated this 19th day of March, 1947.

/s/ STANLEY D. TAYLOR,

Official Court Reporter.

[Endorsed]: Filed April 24, 1947. [398]

District Court of the United States, Eastern District
of Washington, Southern Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,
Defendant.

VERDICT

We, the Jury in the above-entitled cause, find for
the defendant.

D. O. SHATTUCK,
Foreman.

Filed Jan. 29, 1947. [400]

District Court of the United States, Eastern District
of Washington, Southern Division

No. 242

E. A. EMERSON, et ux.,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,

Defendant.

VERDICT

We, the Jury in the above-entitled cause, find . . .

D. O. SHATTUCK,
Foreman.

Filed Jan. 29, 1947. [401]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

VS.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION,
Defendant.

JUDGMENT

This matter having come on for hearing before the undersigned judge of the above-entitled court, sitting with a jury, all parties being present and represented by their attorneys of record, a jury was duly selected and sworn to try the issues in the case; that thereafter the plaintiffs' counsel made an opening statement to the jury following which the plaintiffs produced evidence in their own behalf and when the plaintiffs rested the defendant did challenge the legal sufficiency of the plaintiffs' evidence and moved the court for a dismissal of the complaint with prejudice; that following argument of counsel in connection with said motion the court denied the defendant's challenge and motion to dismiss the complaint with prejudice; that thereafter the defendant, through its attorneys, made an opening statement to the jury, adduced testimony on

behalf of the defendant following which the plaintiffs adduced testimony on rebuttal and following which the defendant adduced testimony on surrebuttal; that when all parties had rested the defendant renewed its challenge to the legal sufficiency of the evidence made at the close of the plaintiffs' case and moved the court at that time to direct the jury to return a verdict in behalf of the defendant as a matter of law; that following argument of counsel in connection with this motion the court granted said motion and did direct the jury to sign and return a verdict in behalf of the defendant; that thereafter the jury, in accordance with said instructions of the court, did sign a verdict [402] in favor of the defendant and against the plaintiffs and said verdict was duly read in open court and filed; now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs' complaint be and it is hereby dismissed with prejudice, the defendant to have its costs against the plaintiffs to be taxed herein.

Dated this 10th day of February, 1947.

SAM M. DRIVER,

United States District Judge.

Feb. 5, 1947.

Approved as to form:

KENNETH HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Feb. 10, 1947. [403]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

JUDGMENT

This matter having come on for hearing before the undersigned judge of the above-entitled court, sitting with a jury, all parties being present and represented by their attorneys of record, a jury was duly selected and sworn to try the issues in the case; that thereafter the plaintiffs' counsel made an opening statement to the jury following which the plaintiffs produced evidence in their own behalf and when the plaintiffs rested the defendant did challenge the legal sufficiency of the plaintiffs' evidence and moved the court for a dismissal of the complaint with prejudice; that following argument of counsel in connection with said motion the court denied the defendant's challenge and motion to dismiss the complaint with prejudice; that thereafter the defendant, through its attorneys, made an opening statement to the jury, adduced testimony on behalf of the defendant following which the plain-

tiffs adduced testimony on rebuttal and following which the defendant adduced testimony on surrebuttal; that when all parties had rested the defendant renewed its challenge to the legal sufficiency of the evidence made at the close of the plaintiffs' case and moved the court at that time to direct the jury to return a verdict in behalf of the defendant as a matter of law; that following argument of counsel in connection with this motion the court granted said motion and did direct the jury to sign and return a verdict in behalf of the defendant; that thereafter the jury, in accordance with said instructions of the court, did sign a verdict in favor of the defendant and against the plaintiffs and said verdict was duly read in open court and filed; now, therefore, it is hereby [404]

Ordered, Adjudged and Decreed that the plaintiffs' complaint be and it is hereby dismissed with prejudice, the defendant to have its costs against the plaintiffs to be taxed herein.

Dated this 10th day of February, 1947.

SAM M. DRIVER,

United States District Judge.

Feb. 5, 1947.

Approved as to form:

KENNETH HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Feb. 10, 1947. [405]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the court for the entry of an order setting aside the verdict of the jury and granting plaintiffs a new trial upon the grounds and for the reason of irregularity in the orders of the court granting defendant's motions at the close of the giving of testimony in the trial of the above action and directing the jury to return a verdict for the defendant and for the reason and upon the grounds that error in law occurred at the trial, both of which grounds and reasons materially prejudiced the substantial rights of the plaintiffs.

The particular error relied upon by plaintiffs in moving for said new trial is the ruling of the court that lack of a direct contractual relationship or privity of contract between the plaintiffs and defendant constitutes a defense as a matter of law to plaintiffs' action based upon the negligence of the defendant in recommending and representing Elgetol as a mildew control when at such time defendant knew, or in the exercise of reasonable care should have known that Elgetol was not a mildew control but was in fact injurious and harmful to the growing trees and crop, and to plaintiffs' action based upon breach of warranty, express or implied, that Elgetol was a mildew control. [406]

This motion is based upon the pleadings and

papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

KENNETH C. HAWKINS,
NAT. U. BROWN,
Attorneys for Plaintiffs.

Service Acknowledged and Copy Received of Motion herein this 13th day of February, 1947.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
By W. R. McKELVY,
Attorneys for Defendant.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
a Corporation,
Defendant.

MOTION FOR NEW TRIAL

Come now the plaintiffs above named and respectfully move the court for the entry of an order setting aside the verdict of the jury and granting plaintiffs a new trial upon the grounds and for the reason of irregularity in the orders of the court granting defendant's motions at the close of the

giving of testimony in the trial of the above action and directing the jury to return a verdict for the defendant, and for the reason and upon the grounds that error in law occurred at the trial, both of which grounds and reasons materially prejudiced the substantial rights of the plaintiffs.

The particular error relied upon by plaintiffs in moving for said new trial is the ruling of the court that lack of a direct contractual relationship or privity of contract between the plaintiffs and defendant constitutes a defense as a matter of law to plaintiffs' action based upon the negligence of the defendant in recommending and representing Elgetol as a mildew control when at such time defendant knew, or in the exercise of reasonable care should have known that Elgetol was not a mildew control but was in fact injurious and harmful to the growing trees and crop, and to plaintiffs' action based upon breach of warranty, express or implied, that Elgetol was a mildew control. [408]

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Plaintiffs.

Service Acknowledged and Copy Received of Motion herein this 13th day of February, 1947.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Attorneys for Defendant.

Filed Feb. 17, 1947. [409]

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFFS' MOTION
FOR NEW TRIAL

This matter having come on for hearing before the undersigned upon the plaintiffs' motion for a new trial served and filed herein subsequent to the entry of a judgment dismissing the above-entitled action with prejudice entered on February 10, 1947, and the court having listened to argument of counsel in connection with said motion and being fully advised in the premises, and being of the opinion that said motion should be denied; now, therefore, it is hereby

Ordered and Adjudged that the plaintiffs' motion for a new trial be and it is hereby denied and the plaintiffs are allowed an exception to this ruling.

Dated this 7th day of March, 1947.

SAM M. DRIVER,

United States District Judge.

Approved as to form:

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Mar. 7, 1947. [410]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 242

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Defendant.

ORDER DENYING PLAINTIFFS' MOTION
FOR NEW TRIAL

This matter having come on for hearing before the undersigned upon the plaintiffs' motion for a new trial served and filed herein subsequent to the entry of a judgment dismissing the above-entitled action with prejudice entered on February 10, 1947, and the court having listened to argument of counsel in connection with said motion and being fully advised in the premises, and being of the opinion that said motion should be denied; now, therefore, it is hereby

Ordered and Adjudged that the plaintiffs' motion for a new trial be and it is hereby denied and the

plaintiffs are allowed an exception to this ruling.

Dated this 7th day of March, 1947.

SAM M. DRIVER,

United States District Judge.

Approved as to form:

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Plaintiffs.

Filed Mar. 7, 1947. [411]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Consolidated Civil Nos. 240 and 242

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

NOTICE OF APPEAL

Notice Is Hereby Given That J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, husband wife, the plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgments entered in the above-entitled actions on the 10th day of February, 1947, and from order denying Motion for new trial entered on the 7th day of March, 1947.

The above-entitled cases were consolidated for

trial by stipulation, and were likewise at the close of the case by stipulation consolidated for appeal.

KENNETH C. HAWKINS,

NAT. U. BROWN,

Attorneys for Appellants, J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, Husband and Wife.

Copy of this Notice mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Evenson & Uhlmann, Attorneys for Defendant, April 16th, 1947.

A. A. LaFRAMBOISE,

Clerk, U. S. District Court.

By THOMAS GRANGER,

Deputy.

[Endorsed]: Filed April 16, 1947. [412]

[Title of District Court and Cause.]

MOTION

Come now the plaintiffs and appellants and move the court to make an order to transmit to the Circuit Court of Appeals Plaintiffs' Exhibits H, J, K, L, F and G, such exhibits being photographs, printed material and physical objects and not being capable of adequate reproduction.

/s/ W. R. McKELVY,
SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,
Attorneys for Defendant.

/s/ KENNETH C. HAWKINS,
/s/ NAT. U. BROWN,
Attorneys for Appellants.

Copy of this Motion mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Everson & Uhlmann, Attorneys for Defendant, April 1947.

.....,
Clerk.

[Endorsed]: Filed May 2, 1947. [413]

[Title of District Court and Causes.]

ORDER

This matter coming on in its order before the undersigned Judge of the above-entitled court upon the motion of the plaintiffs, which has been stipulated by the attorneys for the defendant, and the court being fully advised,

Now, Therefore, it is hereby

Ordered, Adjudged and Decreed that the Clerk of the Court be and he is hereby authorized to transmit to the Circuit Court of Appeals Plaintiffs' Exhibits H, J, K, L, F, and G, such exhibits being evidence not capable of adequate reproduction.

Done in Open Court this 2nd day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

KENNETH C. HAWKINS,
Of BROWN & HAWKINS,
Attorneys for Plaintiffs.

[Endorsed]: Filed May 2, 1947. [414]

[Title of District Court and Causes.]

ORDER

This matter coming on in its order before the undersigned Judge of the above-entitled court upon the motion of the plaintiffs pursuant to Rule 73, Subdivision "E" of the Rules of Civil Procedure, and the court being fully advised,

Now, Therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiffs herein be and the same are hereby authorized to file a Bond of Appeal herein within five days from the date hereof, which Appeal Bond shall be in the sum of \$250.00.

Done in Open Court this 2nd day of May, 1947.

SAM M. DRIVER,

Judge.

Presented by:

K. C. HAWKINS,

Of BROWN & HAWKINS,

Attorneys for Plaintiffs.

[Endorsed] Filed May 2, 1947. [415]

[Title of District Court and Causes.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that We, J. D. Keck, Harry K. Stahler, E. A. Emerson and Lewis Emerson, the plaintiffs above named, as Principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto California Spray-Chemical Corporation, a corporation, the defendant above named in the just and full sum of Two Hundred Fifty Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of May, 1947.

The condition of this obligation is such, that whereas, the above named defendant on the 10th **day of February, 1947**, in the above entitled action and court, recovered judgments against the plaintiffs above named for dismissal of the complaint and costs and disbursements.

And Whereas, the above named Principals have heretofore given due and proper notice that they appeal from said decision and judgments of said District Court of the United States for the Eastern District of Washington, Southern Division.

Now, Therefore, if the said Principals, J. D. Keck, Harry K. Stahler, E. A. Emerson and Lewis

Emerson shall pay to California Spray-Chemical Corporation, a corporation, the defendants above named, all costs and damages that may be awarded against plaintiffs on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars, (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

J. D. KECK,
By KENNETH C. HAWKINS,
His attorney,

HARRY K. STAHLER,
By KENNETH C. HAWKINS,
His attorney,

E. A. EMERSON,
By KENNETH C. HAWKINS,
His attorney,

LEWIS EMERSON,
By KENNETH C. HAWKINS,
Her attorney.

AMERICAN SURETY
COMPANY OF NEW YORK,
By GEORGE M. LEMON,
Attorney in fact.

Approved this 2nd day of May, 1947.

A. A. LAFRAMBOISE,
Clerk, U. S. District Court.

[Endorsed]: Filed May 2, 1947. [417]

[Title of District Court and Causes.]

STATEMENTS OF POINTS ON APPEAL

1. The United States District Court was in error in granting defendant's motion for nonsuit and a directed verdict at the close of the case, and in refusing to submit the case to the jury for the reason that the evidence and exhibits produced were sufficient to go to the Jury on the question of whether there was actionable negligence on the part of the defendant which negligence was the proximate cause of damage to the plaintiffs.

2. The United States District Court was in error in granting judgment to the defendant and refusing to grant a new trial for the plaintiffs for the reason that the testimony and evidence produced was sufficient to go to the Jury on the question of whether there was negligence on the part of the defendant, which negligence proximately caused damage to the plaintiffs.

3. The United States District Court erred in holding as a matter of law that privity of contract between plaintiffs and the defendant was necessary in order to make negligence of defendant actionable, under the circumstances of these cases.

4. The United States District Court erred in not holding that representations and recommendations of defendant to the plaintiffs that "Elgetol" was a mildew control, coupled with the failure on the part of the defendant to test said "Elgetol" with reasonable prudence under the circumstances, at a time when it knew or in the exercise of reasonable care should have known that the use of "Elgetol"

as a mildew control and its application as directed would likely result in damage to plaintiffs' crops, entitled plaintiffs to submission of the case to the Jury for the determination of facts, regardless of whether or not a direct contractual relationship existed between the plaintiffs and defendant.

/s/ KENNETH C. HAWKINS,

/s/ NAT U BROWN,

Attorneys for Appellants.

Service accepted and copy received thisday of April, 1947.

Attorneys for Appellee.

[Endorsed]: Filed May 13, 1947. [421]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the foregoing type-written pages, numbered 1 to 426, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, and by the supplemental designation of record on appeal filed by counsel for the Appellee, as the same re-

mains on file and of record in my office, and that the same constitutes the record on appeal of the Appellants, J. D. Keck and H. K. Stahler, and E. A. Emerson and Lewis Emerson, husband and wife, from the Judgment of the District Court of the United States for the Eastern District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in the transcript of record on appeal is a copy of all exhibits received in evidence in said cause, except Plaintiffs' Exhibits F, H, J, K and L, and Plaintiffs' Identification G. Said original exhibits F, H, J, K and L, and Plaintiffs' Identification G, are being transmitted pursuant to order of the District Court, Exhibit J, being sent under separate cover.

I further certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record as called for in Appellants' Designation of record on appeal amount to \$31.50, and the same has been paid in full by Kenneth C. Hawkins of attorneys for Appellant.

I further certify that the fees of the Clerk of this Court for preparing and certifying that portion of the foregoing typewritten record on appeal as called for in Appellee's supplemental designation of record on appeal amount to \$10.10, and the same has been paid in full by W. R. McKelvy, of attorneys for Appellee.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at

Yakima, Washington, in said district, this 19th day of May, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court,

By /s/ THOMAS GRANGER,

Deputy.

[Endorsed]: No. 11634. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, husband and wife, appellants, vs. California Spray-Chemical Corporation, a corporation, Appellee. Transcript of Record Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed May 22, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11634

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,

vs.

CALIFORNIA SPRAY - CHEMICAL CORPO-
RATION, a corporation,
Defendant.

E. A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,
Plaintiffs,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,
Defendant.

ADOPTION OF POINTS ON APPEAL

Comes now the appellants and adopt the points on appeal filed in the United States District Court for the Eastern District of Washington. The appellants intend to point out and claim as error all such matters and all adverse rulings.

/s/ NAT U. BROWN,
/s/ KENNETH C. HAWKINS,
Attorneys for Appellants.

Copy mailed to W. R. McKelvy and Skeel, McKelvy, Henke, Evenson and Uhlmann, Attorneys for Appellee, June 24, 1947.

/s/ KENNETH C. HAWKINS,
Attorney for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 25, 1947.

No. 11634

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
Husband and Wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED

SEP 26 1947

No. 11634

United States
Circuit Court of Appeals
For the Ninth Circuit

J. D. KECK and HARRY K. STAHLER, and
E. A. EMERSON and LEWIS EMERSON,
Husband and Wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Witnesses, Defendant:	
Beckwith, A. J.	
—direct	341
—cross	343
Brackett, D. W.	
—direct	320
—cross	329
Clark, Cecil C.	
—direct	296
—cross	303
—redirect	304
Ketcham, Edward	
—direct	305
—cross	315
Knueppel, A. C.	
—direct	344
Liniger, Lawrence	
—direct	331
—cross	336
—redirect	340
Shuman, David H.	
—direct	316
—cross	319

Witnesses, Plaintiffs:

Crews, Robert W.

—direct 351

—cross 354

Dowdy, W. B.

—direct 378

—cross 380

Gibson, Miles

—direct 375

—cross 376

Jones, Otto

—direct 368

—cross 370

—redirect 374

Meyers, Fred C.

—direct 364

—cross 365

Rademacher, H. S.

—direct 358

—cross 362

Stipulation for Supplemental Transcript of

Record 384

In the District Court of the United States for
the Eastern District of Washington, Southern
Division

No. 240

J. D. KECK and HARRY K. STAHLER,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL
CORPORATION, a corporation,
Defendant.

and

No. 242

E. A. EMERSON and LEWIS EMERSON,
husband and wife,
Plaintiffs,
vs.

CALIFORNIA SPRAY-CHEMICAL
CORPORATION, a corporation,
Defendant.
(Consolidated)

RECORD OF PROCEEDINGS AT THE TRIAL
January 27, 1947

Before: Honorable Sam M. Driver,
United States District Judge.

CECIL C. CLARK

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please?

A. Cecil C. Clark.

Q. Where do you live, Mr. Clark?

A. Near Sawyer.

Q. And you're an orchardist?

A. Yes, sir.

Q. How long have you been in that business?

A. Oh, I started with my own orchard in 1916.

Q. Had a little experience with sprays, I suppose, have you? A. Yes, some.

Q. When did you learn of Elgetol, or Elgetol "30" first, do you know?

A. Oh, in the—I read about it in the trade journals through the year, I believe, of '43, and I inquired about it and got information on it through the winter of '44.

Q. Did you use it at all in 1943, Mr. Clark?

A. 1943? No.

Q. Did you use Elgetol in 1944? A. I did.

Mr. Hawkins: I object to this testimony, your Honor, for the reason that I can see no materiality, whether Mr. Clark used Elgetol is entirely imma-

(Testimony of Cecil C. Clark.)

terial. The question is what happened on Mr. Emerson's place, and on Mr. Keck's place. This is entirely without the issues.

The Court: What is the purpose, Mr. McKelvy?

Mr. McKelvy: Well, it all goes to the question, your Honor, of whether or not Dr. Regan here had reason to believe—whether or not due care, so-called, was being exercised by him.

The Court: Overrule the objection. You may proceed.

(Whereupon the reporter read the last preceding question and answer.)

Direct Examination

(Continued)

Q. What varieties did you use it on in 1944?

A. Yellow Transparents.

Mr. Hawkins: I again object, your Honor. The use of Elgetol on Yellow Transparents is not the use of Elgetol on Jonathans, Winesaps, or Romes, with which we're concerned here. Whatever results this man may have had from an application of Elgetol on Yellow Transparents certainly has no materiality in this case.

The Court: Will it be shown Dr. Regan knew of its use?

Mr. McKelvy: Yes, your Honor.

The Court: Overrule the objection.

(Testimony of Cecil C. Clark.)

Direct Examination
(Continued)

Q. What did you use it for, thinning, or mildew, or both?

A. It was intended for thinning.

Mr. Hawkins: I again renew my objection, and move that it be stricken. There is certainly not any connection between thinning and mildew control.

The Court: I think that came out on plaintiffs' case. Overrule the objection.

Direct Examination
(Continued)

Q. When did you apply the Elgetol in 1944? I don't mean the date, if you don't know it, but the stage of the trees.

A. About two days after the center bloom opened in the cluster, so that I figured there's a set, and then you can kill off the others; about mid-bloom, I presume.

Q. Did you talk to Dr. Regan about the use of this before you used it in 1944?

A. I did.

Q. What did Dr. Regan tell you about the use of Elgetol, if you remember?

Mr. Hawkins: I certainly object to that, your Honor. That certainly has no bearing on this case.

The Court: Well, I'll sustain the objection. I don't see the materiality of that.

Mr. McKelvy: Well, I don't want to argue the

(Testimony of Cecil C. Clark.)

Court's ruling, but the purpose of it is this; the reasonableness of what Dr. Regan tells someone should be proven by what he told other growers in similar circumstances.

The Court: I think not. I'll sustain the objection.

Direct Examination
(Continued)

Q. Did you learn about Elgetol any place other than the trade journals before you used it in 1944?

A. Well, with my talks with Dr. Regan, yes.

Q. And did you talk with Dr. Regan more than once before you applied it in 1944?

A. Oh, yes; several times.

Q. Then you applied it after the king blossom, you've already told us, two or three days. How many trees or how much did you use?

A. Put it on about a half an acre.

Q. How many acres did you have?

A. We had one acre, and put it on half of it.

Q. And what result did you get so far as the spray was concerned?

A. Well, we had a very material assistance in thinning, and to our surprise, we controlled mildew, which had been a very severe problem in these apples. We controlled it on the half we sprayed with Elgetol, but the other half had a very severe infestation of mildew.

Q. Did that affect the crop at all, that year, the mildew?

(Testimony of Cecil C. Clark.)

A. Well, it affected the quality of the apples. It apparently affected the 1945 crop, because the half that we sprayed with Elgetol in 1945 had a fine crop, and the other half was almost a failure.

Q. So that I am sure we understand that, you mean the half you sprayed in 1944 had a good crop in 1945? A. Yes.

Q. I see; and the other half was a failure in 1945? A. Yes.

Q. How would you compare the results you got in controlling mildew with any other spray you had used before?

A. Well, it was much better than anything we have ever used for mildew.

Q. How large an orchard do you operate, Mr. Clark?

A. About two hundred and fifty acres.

Q. And did you have a serious mildew problem in these apples you told us about, in 1944?

A. Yes, we have had a serious problem with mildew ever since we had it.

Q. Now, did you use Elgetol in 1945?

A. I did.

Q. And on what trees, and for what purpose?

A. Well, I used it on this acre, and then on about three other acres of Transparents that we had.

Q. And when did you use it on that occasion?

A. Same time, just after the king blossom we figured is set.

Q. What result did you get on thinning and mildew control, if any?

(Testimony of Cecil C. Clark.)

A. Well, we had a very good assist in the thinning; of course, on Transparents, it won't thin them completely, because they bloom over such a long period of time, but it cut our thinning bill about two-thirds.

Mr. Hawkins: May I interpose a question? What year is this? A. 1945.

Mr. Hawkins: Your Honor, I move that that testimony be stricken. It is certainly no proof that would tend to justify Dr. Regan in making his recommendations in 1945, because the results wouldn't be known until too late.

Mr. McKelvy: Those wouldn't be known, but it goes again to the question of whether Dr. Regan was out here telling somebody something that was wrong, or whether it was right.

The Court: I will overrule the objection.

Direct Examination
(Continued)

Q. Were you through?

A. No, I think I only got it half finished. I believe you asked the result in 1945, and I explained it helped in the thinning, and it also controlled the mildew, and we put it on for the double purpose that year of thinning and mildew control.

Q. Did you get good results in controlling mildew in 1945? A. Oh, yes.

Q. Did you get any damage in 1945?

A. No, I had no damage from it.

Q. Did you use the product Elgetol in 1946?

(Testimony of Cecil C. Clark.)

A. To go back to that other question now, what would you call damage?

Q. Well, any damage to your crop, and foliage burn.

A. Oh, there might be occasional leaves that would be burned a little, but it would be of no consequence, but we did kill a lot of the apples, and that's what we were after.

Q. The principal of the thinning was to stop some of the apples from pollinizing? A. Yes.

Q. That, of course, you would not call damage?

A. No, that's a benefit, of killing the blossoms.

Q. Now, getting to 1946, did you use Elgetol in 1946? A. I did.

Q. And how, and when?

A. Well, it would be just the same way, for thinning and mildew control, and applied at what we would call in full bloom, after the king bloom has pollinized.

Q. Did you get mildew control with good results? A. I did.

Q. And how about the thinning? Did you get the proper results?

A. Yes, just about the same we had all years before, two years before.

Q. How big an acreage did you spray in 1946 with Elgetol?

A. In 1946 I did not have this acre I mentioned first, but I sprayed three hundred trees.

Q. Three hundred trees?

A. Two hundred ninety-four, to be exact.

Q. Did you get any results with using Elgetol

(Testimony of Cecil C. Clark.)

so far as biennial production, or off and on years, is concerned?

A. Yes, that's one of the bad things about Transparents. They load up one year and lay off the next, and Elgetol has straightened that out, so we get a continued crop.

Q. How does it straighten them out?

A. By thinning them early, so there isn't the strain on the tree, and another thing, these Transparents are early apples, and you have to get size quick, and when we spray with this Elgetol the size develops so much faster that the crop is more valuable, because it comes on early, and in my case it's been a very, very valuable spray.

Q. You expect to use it in 1947, Mr. Clark?

A. Yes, I do. I'll not only put it on these Transparents, but on some young Jonathans that are starting to bear.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Clark, on this block of Newtowns that you sprayed in 1944——

A. Transparents.

Q. I thought you said Yellow Newtowns.

A. If I did I should have said Transparents.

Q. I'm sorry. Did you apply that in the pink?

A. No, at full bloom.

Q. And you did not apply that in the calyx either, did you?

A. No.

Q. In 1945 did you apply the Elgetol spray in the pink?

A. No, it was in the same stage.

(Testimony of Cecil C. Clark.)

Q. And did you apply it in the calyx?

A. No.

Q. In 1946 did you apply the Elgetol in the pink? A. No; full bloom again.

Q. Did you apply it in the calyx? A. No.

Q. You applied it before the calyx in all cases?

A. It would be just two or three days ahead of the calyx.

Q. Just after the king bud had set, about two days after the king bud had set, is that right?

A. Yes.

Q. And you plan to use the same program in 1947, this year? A. Yes, I do.

Q. You don't plan to make a pink spray, do you? A. No, I never have made a pink spray.

Q. And you do not plan to make a calyx spray either, do you? A. No.

Mr. Hawkins: I think that's all.

Redirect Examination

By Mr. McKelvy:

Q. Mr. Clark, so far as a spray is concerned, where it is used primarily for mildew, what is the standard time of applying it, if you know?

A. Well, depends on what you're using, and of course there are some different ideas about that, but I think lime-sulphur, you can use it at 'most any stage along, but you have to vary the strength. I've never used much lime-sulphur, so I wouldn't know about that, but with zinc coposole you put that on in the pink, I believe. I would have to

(Testimony of Cecil C. Clark.)

check up to be sure about that. It's been several years, that was before I used Elgetol, so I don't remember.

Q. Ever get any damage from lime-sulphur if the weather is wrong?

A. Well, I've seen it, but I haven't used lime-sulphur for so long that I haven't had damage.

Q. You have seen some damage with lime-sulphur?

A. I have seen trees killed with it.

Q. Here in the valley?

A. Yes.

Q. You have seen trees killed with it? That's all.

Mr. Hawkins: I have no further questions.

Mr. McKelvy: Mr. Clark I think had to go to the doctor at three o'clock, and wanted to be excused.

Mr. Hawkins: No objection.

The Court: He may be excused.

(Whereupon, there being no further questions, the witness was excused.)

EDWARD KETCHAM

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Would you give us your name, please?

A. Edward Ketcham.

(Testimony of Edward Ketcham.)

Q. And where do you live, Mr. Ketcham?

A. In Yakima.

Q. What is your business?

A. Well, for this purpose I own an orchard.

Q. For this purpose? You're an orchardist, for one thing, and what else do you do?

A. Well, I am the manager of a dehydrating plant in Selah.

Q. That's the Appella Plant?

A. Formerly; it's now the Vacu-Dry Corporation.

Q. And did you own an orchard in 1944 and 1945? A. Yes.

Q. The same orchard in those years; did you have occasion to use Elgetol on those orchards?

Mr. Hawkins: I wonder if we could find out where the orchard is, first?

Q. Tell us where the orchard is.

A. It is located on Naches Heights, about thirteen miles northwest of Yakima. I used Elgetol in 1945 and 1946.

Q. Did you use it in 1944?

A. No, I did not use it in 1944.

Q. Did you have occasion to use it for thinning, or mildew? A. I used it for mildew control.

Q. How did you happen to use Elgetol in 1945 for mildew control?

A. Well, I had a very serious mildew problem in Jonathans and also in Romes, some in Winesaps, and prior to 1944 I had tried lime and sulphur without any success, and in 1944 I started looking

(Testimony of Edward Ketcham.)

for other materials, and I think it was late in the season I began to hear the reports that some of the growers had had in mildew control, who had used Elgetol as a bloom thinner that spring, so I tried it in 1945.

Q. Did you talk with Dr. Regan before using it, or not? A. Yes.

Q. Did Dr. Regan tell you anything other than the fact——

Mr. Hawkins: Just a moment; I object to that question; it is certainly leading and improper.

Q. Well, I was just trying to get my question, to fix your objection; anything beyond what you have already testified you knew, that other growers had used it in 1944 and got good results? Now wait, don't answer it.

Mr. Hawkins: Now I object to that, your Honor.

Mr. McKelvy: Object to what?

Mr. Hawkins: Your question.

The Court: That's a question as to whether Dr. Regan told him others had used it?

Mr. McKelvy: No, whether Dr. Regan gave him any information back of 1944, which he already testified he knew from other sources, other growers had used it in 1944.

The Court: I'll overrule the objection.

A. The first discussion I had with Dr. Regan regarding Elgetol was in 1945.

Q. What did he tell you as to its use in the valley here?

(Testimony of Edward Ketcham.)

The Court: I think I'll sustain an objection to that. I can't see the materiality of something Dr. Regan said to somebody else.

Mr. McKelvy: Well, I don't know how you would prove the thing other than presumably Dr. Regan didn't go to one grower and tell him one thing and another another.

Mr. Hawkins: You can't argue that, counsel; the issue here is what, for instance, he wrote on plaintiffs' identification F, not what he told this witness.

The Court: The jury will step out just a minute. We might as well get this decided now.

(Whereupon the following proceedings were had without the presence of the jury.)

Mr. Hawkins: I made the objection; I'll state my grounds for it. It is perfectly obvious what counsel is attempting to do is to prove by all these witnesses that Dr. Regan never made any statements that this was a good mildew control, and I certainly object to any testimony along that line, and furthermore, any conversation that took place between the witness and Dr. Regan is not binding on the plaintiffs, and is entirely immaterial.

Mr. McKelvy: I'll agree with that last, that it is not binding here. We have, as I understand it, a question of whether Dr. Regan was guilty of negligence in making a statement, whether or not there was due care that he had to use in instructing the particular growers, the plaintiffs in this case.

(Testimony of Edward Ketcham.)

Now, we have contended, and the plaintiffs have testified, that they knew about it in 1944, they heard about its use in 1944 as a good mildew control incidental to the thinner. Now, I propose to show here what Dr. Regan—I won't contend everything he said would be admissible, but I contend it would be proper to show that Dr. Regan based his statement on what other growers found in 1944 by using Elgetol. That's my whole purpose; if I'm wrong, all right.

The Court: Is the way to prove that by showing what he said to other growers in 1945? What you're trying to prove by this witness is that Dr. Regan told him he knew Elgetol was all right because he knew of others using it in 1944.

Mr. McKelvy: Then you're saying the plaintiff says he said it, Dr. Regan says he didn't say it, and that ends it. You can't show what Dr. Regan said generally about it.

The Court: You're bringing the growers in to show they used it in 1944, at least one to show they used in 1944, and if Dr. Regan says he knew of that use, it seems to me that would be about the only way you can prove it. It seems to me you're getting to self-serving matter here when you show what he said to others in the year 1945, as to why he was making a particular recommendation.

Mr. Hawkins: I would like to make a further observation while the jury is out. The purpose of this testimony, according to counsel's statement, is to show that when Dr. Regan made these what

(Testimony of Edward Ketcham.)

counsel claims are alleged recommendations in 1945 to the plaintiffs, he was acting in due care because these people had tested the material on their orchard. All right, granted that he can introduce testimony of experience in 1944; does that justify the admission of experience in 1945 or 1946, or what these people will do in 1947? The test is whether or not he was exercising due care in the spring of 1945 in recommending the use of Elgetol as a mildew control. What possible bearing can the results obtained later on in 1945, 1946, and 1947 have to do with that issue?

The Court: Well, I thought of that in connection with the 1945 and 1946 testimony, but your plaintiffs have to show not only that they were directed to apply this spray in a certain way by Dr. Regan, and that they followed the directions, but that that application resulted in damage to their crop, and destroyed the crop. If somebody else used it in 1945 and 1946 and didn't destroy their crop, that may be admissible. That may be the theory.

Mr. McKelvy: We have a right to show this product isn't a thing that was a flash in the pan in 1945; it's still here with us. It goes to the question of whether Dr. Regan was negligent or not, if that's what the case is about now, if it is still here, people still using it, still like it.

Mr. Hawkins: Whether you're using it in later years doesn't prove that he was exercising due care. Let's suppose that in 1945, when he only had one

(Testimony of Edward Ketcham.)

year's experience in this valley, let's suppose he recommended its use and later on it turned out to be a perfectly good spray and nobody was hurt; still, could he claim he was exercising due care in recommending a product only tested one year, and in that year not in a scientific manner, nor in a manner he directed the application to be made?

Mr. McKelvy: Certainly; it shows later he was right.

The Court: It might depend on whether the application was made in the same way, for the same purpose, at the same time. As I understand it, plaintiffs' position is that they used it according to his direction for spray in the pink and calyx, which in the calyx particularly caused their injury. Now, if they used it in some other ways, at full bloom or when the king bud was out, that does not prove necessarily he gave them the right directions, or that he was justified in giving the right directions in 1945. I haven't yet seen any offer made in the later years that they used it in the same way.

Mr. McKelvy: I haven't got that far yet. While the jury is out I would like to get some of these questions straightened out, when plaintiff says in one breath we were negligent because we didn't test it for several years, and then says in the next breath that I can't show that it was successful enough that it is still here, for several years.

Mr. Hawkins: That would merely prove that if you recommended it in 1947 you would have a little more basis for doing so than in 1945, that's

(Testimony of Edward Ketcham.)

all. It would not prove that you were not negligent in 1945 in making such recommendation.

The Court: I think you can show the later years; I have ruled that, with a little different thought in mind. I think, though, you could show that. Certainly, if this spray had been used by growers in substantially the same way, and no damage resulted, it would be very material to the case. The thing I ruled against, though, is the growers testifying as to what Dr. Regan told them was the reason for his making the recommendation, that Dr. Regan told them that he knew that it had been used in prior years. Now, it seems to me about the only way you could show here that the use was the same or similar, sufficiently similar to have probative value, would be for these witnesses to tell what the directions were. If you're going to show what use was made, you would almost have to show under what directions it was used, if directions were given, in order to show the similarity.

Mr. Hawkins: Of course, this opens up the door for us to bring in all these people that did lose their crop in 1945, to testify they lost their crop in 1945. I'm not worried about what doors open up.

Mr. McKelvy: That's why I was trying so hard this morning to get a non-suit, because I knew what was coming.

Mr. Hawkins: If you want to go ahead that way, that's fine.

The Court: Bring in the jury.

(Testimony of Edward Ketcham.)

(Whereupon, the following proceedings were had within the presence of the jury.)

Direct Examination of Edward Ketcham
(Continued)

By Mr. McKelvy:

Q. Mr. Ketcham, I believe you said that you used Elgetol in the pink in 1945? A. No.

Q. For mildew control?

A. No. I used Elgetol in two applications in 1945; the first was in a calyx spray, and the second was in the first cover.

Q. And did Dr. Regan give you any directions in connection with the use of Elgetol that year?

A. Well, naturally, I asked him how much should be used, what strength, and he made a recommendation, and I don't recall exactly what it was, I think somewhere in the neighborhood of, oh, two-thirds of a pint to the hundred, but on that I'm not clear, but before I put on the application I was told by someone who had experience in using it that if I had a thousand gallon spray tank and used a gallon of Elgetol in a thousand gallons that I would do all right, which I did.

Q. And what results did you get from it in 1945?

A. I completely cleaned up the mildew.

Q. Did you have a bad mildew problem there at all?

A. Very bad; very bad. As I stated earlier, I had used lime and sulphur without success, in earlier years, and Zinc copsole without success.

(Testimony of Edward Ketcham.)

Q. Was the mildew in Jonathans, or different varieties?

A. It was most serious in the Jonathans, but was becoming a serious problem in Romes and also in Winesaps.

Q. Did it effect your crop at all in 1945?

A. Well, in 1941 and 1942 I had about 3600 boxes of Jonathans each year; 1944 I had 2600 boxes, of which I think 1700 boxes went to the evaporator, because of mildew damage to the apples, and in 1945, after having used Elgetol for mildew control, I had 3100 boxes, which packed out about ninety per cent fancy and better.

Q. Have you used Elgetol in 1946?

A. I used Elgetol in 1946.

Q. Do you know now whether you intend to use it in 1947, or not?

A. I'll use it in 1947.

Q. What type of crop did you have in 1946 on the trees you had used Elgetol on in 1945?

A. Well, my Jonathans jumped from 3100 to 4200 boxes in 1946, and my Romes jumped from 1300 to 3600; my Winesap production was about the same as it was in 1945; but about double what it had been in 1944.

Q. Did the Elgetol have anything to do with that?

A. Well, I think it did: or put it this way, that if I controlled the mildew using that, the freeing of buds and the terminals of the limbs, and freeing the trees from mildew infestation and helped the 1946 crop.

(Testimony of Edward Ketcham.)

Q. I believe you said something about you were at a place where you were about to treat mildew with an axe, is that right?

A. That's right.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. You did not apply Elgetol in 1944 to your orchard?

A. No.

Q. And in 1945 you did not apply a pink spray?

A. No.

Q. As I understand your testimony, you applied one-third of a pint to a hundred?

A. No, it wouldn't be that, it would be—well, you figure it out; it's a gallon to a thousand.

Q. I thought you said one-third to a hundred?

A. I said about two-thirds, was the first recommendation I heard of, and I finally ended up using about one gallon to a thousand.

Q. You started out with two-thirds to a hundred?

A. I never applied it that way.

Q. You were going to apply it that way, and then later you got word from some other grower that the proper application—

A. Well, I think that was a matter of convenience; I didn't want to measure it.

Q. But at any rate you applied one gallon to a thousand gallons of water. That would figure out

(Testimony of Edward Ketcham.)

pretty close to two-thirds of a pint to a hundred, doesn't it? That's one pint to a hundred and twenty-five gallons. A. Yes.

Q. In 1945 you applied it to your Jons alone?

A. No, I applied it to Jonathans, Winesaps, and Romes.

Q. You applied it to your entire orchard?

A. No, I didn't put any on the Delicious.

Q. I see, but to your entire orchard of Jonathans, Winesaps and Romes?

A. Yes, all of the Jonathans, all of the Winesaps, all of the Romes.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all. I believe you may be excused, if there is no objection.

(Whereupon, there being no further questions, the witness was excused.)

DAVID H. SHUMAN

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please?

A. David H. Shuman.

Q. And where do you live? A. In Selah.

Q. What is your occupation?

A. Fruit grower.

(Testimony of David H. Shuman.)

Q. How long have you been in the business of fruit growing? A. Oh, since about 1921.

Q. How large an orchard or orchards do you have?

A. I have twenty acres where I am.

Q. Have you ever used Elgetol in your spray program? A. I have.

Q. When did you first use it? A. 1944.

Q. And when did you use it then?

A. Well, just past full bloom; it would be almost the calyx spray. Some folks would call it calyx. My object was to kill the late blooms, primarily, to catch that late bloom. It would be really later than the—after the king bloom.

Q. How many trees or how many acres did you use it on? A. I used it on six acres.

Q. What variety?

A. Delicious, Newtons, and Winesaps.

Q. What result did you get from the application? A. I had very good results.

Q. Results in what way, now, do you mean?

A. Well, in thinning my fruit. I got it to where one son and I thinned the whole six acres in two days.

Q. Did you have any mildew problem there?

A. Not very much. There is some mildew, but it is a minor problem.

Q. Did the Elgetol help at all on the mildew?

A. Well, I thought it did.

Q. And do you remember the mixture, of how much you put on?

(Testimony of David H. Shuman.)

A. I used a gallon to the thousand gallons of water. It's easy to measure; you just dump a can in.

Q. Just dump a can in the tank? A. Yes.

Q. How did you happen to use Elgetol in '44?

A. Well, Dr. Regan said that it had been used in the east as a spray for thinning with very good success, and wanted to know if I wouldn't care to try it on a few trees, and I decided to do it all instead.

Q. Had you used it at all before the year 1944?

A. No.

Q. Did you use Elgetol in '45? A. I did.

Q. What result did you get then?

A. Very good; about the same result; very good.

Q. What mix did you use that year?

A. I used one gallon to a thousand.

Q. And when did you apply it?

A. At the same time; it was just a little bit later; it was more nearly calyx, because I wanted to be sure and catch the late bloom. It's the late bloom that really gives you your small apples. It wouldn't be a true calyx; it would be a pre-calyx.

Q. Is a late bloom and an early calyx about the same?

A. Well, that depends upon who's doing it. Some would call the calyx what I used, and some wouldn't. When I sprayed, when I hit the trees, over half, I would say, of the petals come off.

Q. And what results did you get in 1945?

A. Very good result; about the same.

(Testimony of David H. Shuman.)

Q. Did you use it in 1946? A. No.

Q. Why was that?

A. Well, the weather was rather cold at the time, and I was afraid I wouldn't get a good set of fruit, and I didn't think it was necessary. I bought the material, however, but didn't use it?

Q. Expect to use it in 1947, or not?

A. If the fruit bloom warrants it, yes.

Mr. McKelvy: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. You did not spray in the pink in 1944?

A. No.

Q. And you did not spray in the pink in 1945?

A. No.

Q. And you did not spray in the calyx in 1944?

A. Well, that depends upon what you call the calyx. No, I wouldn't call it the calyx myself.

Q. It is not a true calyx?

A. Not what I would call a true calyx.

Q. Two or three days after the king bloom?

A. No, it was longer than that.

Q. Four or five days?

A. Yes, I would say four or five days.

Q. Petals were still on the trees?

A. They were beginning to fall, just beginning to fall.

Q. The true calyx is formed after the petals drop off, is that right?

A. My definition of a true calyx is when about fifty per cent of the petals have fallen.

(Testimony of David H. Shuman.)

Q. Well, the flesh of the apple has formed and it hasn't closed yet, is that right? A. Yes.

Q. And you sprayed before that time?

A. Yes.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all. Do you have any objection to Mr. Shuman being excused.

Mr. Hawkins: Not at all.

(Whereupon, there being no further questions, the witness was excused.)

D. W. BRACKETT

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Will you give us your name, please? Will you tell the jurors your name, please?

A. D. W. Beckett.

Q. Speak up loud enough so all the people on the far end can hear you. Where do you live at the present time, Mr. Brackett?

A. At Bellevue.

Q. Are you retired now? A. Yes.

Q. What was your occupation before you retired? A. Fruit grower.

Q. When did you retire?

A. Oh, a couple of months ago.

Testimony of D. W. Brackett.)

Q. How old are you? A. Seventy.

Q. You think you are old enough to retire?

A. I think so.

Q. How long did you work at the fruit growing business? A. About twenty-eight years.

Q. Where was your place located?

A. At Grandview.

Q. Did you sell out? A. Yes.

Q. What size an acreage did you have there?

A. Forty acres.

Q. What varieties?

A. I had Winesaps, Delicious, and a few Jonathans, and a few trees of Roman Beauties.

Mr. Hawkins: Your Honor, I would like to enter an objection at this time to the testimony of this witness. He's testified that his orchard is at Grandview. The orchards in question are up in the Tieton, out here at Gromore, up at Naches, where the weather is entirely different from what it is at Grandview. I can't see any parallel between this man's experience at Grandview and the results that may or might have been obtained up in these valleys that are higher.

Mr. McKelvy: There's no evidence here the weather is any different.

The Court: How far is that?

Mr. McKelvy: How far is it from here to your orchard?

Witness: About forty-five miles.

The Court: I'll overrule the objection; it's the same general area.

Testimony of D. W. Brackett.)

Direct Examination—Continued

Q. Did you ever use Elgetol as a spray?

A. Yes.

Q. When did you first use it? A. In '44.

Q. How did you happen to use it then?

A. Well, I had been reading a good deal in the horticultural magazines and the eastern publications, particularly, about a thinning spray.

Q. And when did you use it? A. In 1944.

Q. I mean what stage of the trees, or at what time did you use it? Do you have records here?

A. Yes.

Q. I think you showed me your records last night. You can refer to them if you want to. You've got a book in your hand; did you keep that yourself?

A. Yes.

Q. That's your own handwriting?

A. That's a farm diary, farm record.

Q. Did you write the entries in there yourself?

A. Yes.

Q. All right then, you refer to it to refresh your recollection. Now, will you tell us when you used it and for what purpose, in 1944?

A. Well, on April 25th I sprayed Jonathans with Elgetol, four cans for a sixteen hundred gallon tank.

Q. Four gallons? What size cans?

A. Gallon cans.

Q. Four gallons to sixteen hundred gallons of water, is that it?

Testimony of D. W. Brackett.)

A. Yes; well, it figured out to about one and a half per cent—no, one and a half pints per hundred.

Q. And what was the state of the trees at that time?

A. Well, I think it was a little past the critical period; in fact, I know it was.

Q. Well, was it in the pink or in the calyx or in the bloom, or what?

A. Well, it was my first experience—in fact, the Jonathan bloom comes out a good deal the same time; it's hard to hit the king bloom; and the result was it didn't do any good with the Jonathans.

Q. Did it do any harm? Did it damage the Jonathans? A. No.

Q. And you used it in bloom, then?

A. I used it in bloom, yes.

Q. Did you use it on any other varieties in '44?

A. Yes.

Q. What were they?

A. Well, let's see; I sprayed a few trees of Winesaps as a test, and we concluded it was too early, and we waited one day interval, and we sprayed the same few trees again, so they had two sprays, that is, those two or three trees had two sprays instead of one. Well, then we sprayed the balance of the orchard, about thirty-five acres, as a thinning spray. I might say my main object was to bring the orchard out of biennial bearing; the thinning was secondary consideration.

Q. What did you mean by bringing it out of biennial bearing?

Testimony of D. W. Brackett.)

A. Well, the trees would overbear one year and not enough fertility to bear the next year.

Q. How would Elgetol take care of that, prevent that?

A. Fine.

Q. How would it do it, though, prevent it?

A. Well, the first bloom in the Winesaps and Delicious, in particular, there's about six blooms of Winesaps to every cluster. Well, the center bloom is the king bloom. It comes out about twenty-four hours, sometimes a little longer on account of the weather, and if you can wait until that king bloom is pollinated, there's a very short period, well, then, when your set in the king bloom is pollinated, then spray, and it kills the pollen or the pistil or something. In the other varieties it is impossible to do a perfect job, but it reduces the drain on the fertility of the tree, and reasonably insures of having a crop every year. It's worked out so with us.

Q. Did you get any damage at all in 1944?

A. No.

Q. Did you use the Elgetol in 1945?

A. Yes—well, I would say in 1944 some of the small trees about eight or ten feet high, it took off too much bloom. The other trees were not injured.

Q. All right; now in '45 what did you do?

A. I was giving you 1945 instead of 1944, but the results were the same, practically. I might say that in—yes, in 1945, I had the wrong year, in 1945 we used two pints of Elgetol on the Jonathans

Testimony of D. W. Brackett.)

instead of a pint and a half. It didn't do any good and it didn't do any harm.

Q. I see; and when did you put it on, the two pints to the hundred?

A. I put it on on April 25, in 1945.

Q. And the trees were there when?

A. I've got a plat here somewhere. There. It was just a very little later than that period, when this king blossom was open. Now, this would open about——

Q. Later than the full pink, in other words?

A. Oh, yes.

Q. Just past the full pink? I just want to get in the record here what you're showing me. You mean it was a little later than the full pink?

A. Well, here's what they call the full pink. This king blossom would be out in a very few hours.

Q. Now, did you get any damage in 1945 at all?

A. No.

Q. Did you get results at all in 1945?

A. Yes.

Q. Did you have some trouble with mildew in the Jonathans in 1945?

A. No, we have very little mildew in the lower valley.

Q. Did you have some trees that had mildew?

A. Oh, say, I'll—let me see; yes. I'll take that back. We did have mildew late in the season in '45.

Q. Well, tell us about that. I think you told me about that yesterday. How many trees, and what happened there?

Testimony of D. W. Brackett.)

A. Well, what happened, we didn't have any crop this year, not to amount to anything.

Q. Why?

A. Well, we didn't do anything for the mildew, it was too late in the season.

Q. You mean you had mildew last year?

A. Late in the season.

Q. And did you spray for mildew at all in the spring?

A. Yes, this spring I sprayed for mildew. I didn't use Elgetol.

Q. But it didn't take care of it?

A. Well, I used sulphur. It took care of it.

Q. But did you have a crop this year?

A. No, the damage was done in 1945.

Q. Will the crop next year be affected by mildew the year before?

A. That is my experience. I've only had one year's experience with mildew in Jonathan or any other variety.

Q. Did you use the Elgetol in 1946?

A. Yes.

Q. Did you have any bad luck with it then, any damage?

A. Well, I didn't have any damage. I had bad luck; I couldn't get Elgetol in time.

Q. I see. Well, your bad luck was that you didn't get it in time, is that it? A. Yes.

Q. But you had no damage to the foliage or to the trees at all?

Testimony of D. W. Brackett.)

A. No; there's a little item here about my bad luck, if you want to hear it.

Q. Do you write it up when you have bad luck and good luck both? Let's see what it is. Well, you refresh your recollection by reading it, and then tell us what happened at that time.

A. Well, we sprayed the Delicious, and when we got ready to spray the Winesaps we found we didn't have any spray, they hadn't any at the warehouse. We wired to Yakima, or the warehouse did, and in the meantime the wind blew and we lost a day and a half, but we put on the Elgetol anyway, but it was money wasted.

Q. Put it this way; does a day and a half make a difference?

A. It was past the pollinating period.

Q. Is it of any importance, the time that the spray is put on? A. Very much so.

Q. Will a day or two difference make any difference? A. You bet.

Q. It will?

A. Yes, I would say that the critical period is, oh, not over one day, possibly less than that. Depends on the weather.

Mr. McKelvy: You may cross-examine.

The Court: The Court will recess for ten minutes.

(Short recess.)

Testimony of D. W. Brackett.)

(All parties present as before.)

(The following proceedings were had without the presence of the jury.)

The Court: Mr. McKelvy, you have called, this is the fifth witness, I believe, grower witness. How many more do you propose to call?

Mr. McKelvy: Not very many; three or four.

The Court: I think that there should be some limitation placed here that isn't unreasonable. I wouldn't want a hundred.

Mr. McKelvy: It would be possible, I can assure you, but I agree with the Court it should be limited.

The Court: I suppose you won't have more than the defendant has, if you call others on rebuttal?

Mr. Hawkins: I think not.

The Court: All right; bring in the jury.

(Whereupon, the following proceedings were had within the presence of the jury.)

Mr. McKelvy: I wanted to ask one other question, if I might.

Direct Examination of D. W. Brackett

(Continued)

Q. Mr. Brackett, you mentioned to me in the recess that you had left some test trees during these years you have told us about, is that right?

A. Yes, what we call check trees. We leave a tree, or a half a tree, unsprayed, so we can check the results of the Elgetol spray, the thinning spray.

Testimony of D. W. Brackett.)

Q. What did you learn about Elgetol by these check trees?

A. Well, I've continued to use it.

Q. Does that mean that you got satisfactory results, is that it? A. Yes.

Mr. McKelvey: You may cross-examine.

Cross-Examination

By Mr. Hawkins:

Q. Mr. Brackett, as I understand it, you had only one experience with mildew, is that right?

A. Yes.

Q. And what year was that in?

A. That was in '46.

Q. 1946? A. Yes.

Q. That is, your '46 crop was down?

A. No, the '45 crop. The mildew appeared late in the season.

Q. The mildew appeared late in the season in 1945?

A. Yes, and I was afraid to apply any remedies, because it was too late. The result showed up in 1946.

Q. And what mildew control did you use in 1946? A. I used lime and sulphur.

Q. Did you use Elgetol in 1946 also?

A. Yes, for——

Q. For fruit thinning?

A. Yes, for thinning.

Q. Now, the weather down at Grandview is about a week or two weeks ahead of the weather in the Yakima Valley, is it not?

Testimony of D. W. Brackett.)

A. In the upper valley, yes.

Q. And in the lower valley normally you don't have the mildew problem that you do in the upper valley, do you? A. No.

Q. That is because it is warmer and drier down there, is that right? A. That is correct.

Q. Now, as I understand it, your use of Elgetol was primarily as a thinner, is that right?

A. Well, it was primarily to bring the orchard out of biennial bearing.

Q. By cutting down the production?

A. By cutting down the setting of the fruit that would reduce the vitality of the tree.

Q. Now, you never sprayed with Elgetol in the pink stage, did you?

A. Well, there is so very little difference; yes, I have, but it is only a tree or two. It was an accident, I might say.

Q. I see; and did you spray at full bloom in these years?

A. I'm satisfied the king bloom had been pollinated by that time, the other blooms were opened, and I sprayed to kill the set, the pollinating set of the surrounding varieties. Of course, you can't do a perfect job, but you can reduce.

Q. That is, you can't cover the entire orchard in two hours, is that the point?

A. No, but it should be covered in ten or twelve, to get results.

Q. There is a very limited period?

A. There is a very limited period.

Testimony of D. W. Brackett.)

Q. And as I understand your testimony, that is directly after the king bloom has set?

A. Yes.

Q. And before the surrounding buds——

A. Have been pollinated.

Q. ——have been pollinated?

A. That's right.

Q. And that was the time you tried to hit the blooms with the Elgetol? A. Yes.

Q. Now, as I understand it, you did not spray in the so-called calyx with Elgetol?

A. No, there's no object in it.

Mr. Hawkins: I think that's all.

Mr. McKelvy: That's all, Mr. Brackett.

The Court: This witness may be excused, then.

Mr. McKelvy: You may be excused, Mr. Brackett.

(Whereupon, there being no further questions, the witness was excused.)

LAWRENCE LINIGER

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Give us your name, please.

A. Lawrence Liniger.

Q. That's Linniger?

A. L-i-n-i-g-e-r.

(Testimony of Lawrence Liniger.)

Q. And where do you live, Mr. Liniger?

A. About nine or ten miles south of Yakima, below the gap.

Q. You're an orchardist?

A. Well, I'm running an orchard for a fruit company.

Q. And for what company?

A. Rainier Fruit Company of Yakima.

Q. And where is the orchard that you are operating for that company?

A. Well, it is about three miles west of Parker, and about nine or ten miles, I would say, pretty well south of here, on Lateral "B."

Mr. Hawkins: Your Honor, for the purpose of the record I would like to object to the testimony of this witness, for the reason he lives below the gap. The previous witness testified there was a substantial difference in weather conditions between the lower valley and the so-called upper valley where these orchards we're concerned with are located. It was testified it was drier and warmer, and they do not have the mildew problem we have in the upper valley. For that reason I think the testimony of Mr. Brackett is not pertinent, although it is in now, and I think, therefore, the testimony of Mr. Liniger is not admissible.

The Court: I'll overrule the objection. I think it goes to the weight, rather than the admissibility.

(Testimony of Lawrence Liniger.)

Direct Examination

(Continued)

Q. How large an orchard do you have?

A. Twenty-eight acres.

Q. And what varieties?

A. Jonathan, Roman Beauties, and Winesaps; a few scattered Delicious, very few.

Q. When did you first use Elgetol, if you did use it? A. In 1944.

Q. And how did you happen to use it then, Mr. Liniger?

A. Oh, I read it in the papers, and what not, it had been used for a thinning purpose more than anything, and we just experimented with a few trees scattered in the orchard, at different stage of bloom. We would hit a few trees one day, and skip a few days, and hit another few, because we weren't sure what stage it should be done at.

Q. What were you trying for, mildew or thinning?

A. We were experimenting at thinning at the time.

Q. What results did you get in 1944?

A. Well, they were—I couldn't tell you just what days it was now, but if we had checked just right on it, there might have been some tests that would be O.K. I think they would have had to have some thinning, but not as much as others.

Q. You under-thinned rather than over-thinned?

A. Oh, yes, our tests did.

(Testimony of Lawrence Liniger.)

Q. Did you have a mildew problem in 1944?

A. Yes, we have had a mildew problem, very severe, for years, I've been there eight years, on this orchard, mostly in the Jonathans, and we have used lime and sulphur in a pink spray with very little results, and after testing these few trees, both Winesaps and Jonathans, we noticed it helped cut down the mildew.

Q. That's in 1944? A. Yes.

Q. Then did you use it in 1945? A. Yes.

Q. And how did you use it then?

A. We used it in a calyx spray.

Q. What mixture did you use, do you remember?

A. A pint to the hundred, and we went over the entire orchards. I might have mentioned there was also Bartlett pears in there as fillers which had a trace of mildew at the time, and we went over the entire orchard, which took a week, or a little better, perhaps. A day or so after we finished the latter part of the orchard it rained. I could give you the date on that if I checked our books, and most generally when you finish your calyx you've got to start right over with your first cover, so we used it again at the rate of two pints to the six hundred gallon tank, which would have been a little less, I don't know how much that would amount to, but that was the way we used it, and we sprayed over half the orchard again the second time.

Q. With Elgetol?

A. Yes, in our first cover, that would be.

(Testimony of Lawrence Liniger.)

Q. What did it do, if anything, so far as controlling the mildew?

A. Well, it really did the mildew up.

Q. Did it up? A. Yes.

Q. And did you get any damage?

A. Some damage on that latter part of the orchard, I might say the west end of the orchard, which was followed by this rain, but not on the east end, and that east end also had two applications, both the calyx and the first cover, and yet there was no damage. Well, what I understand that Elgetol is supposed to do is dry up that; lime and sulphur is also supposed to dry up that mildew.

Q. Did you get as satisfactory result in 1945?

A. Well, we had a little loss, but in my own opinion, I never did ask at the plant, we know it was worth more to us than any damage it did, in my opinion.

Q. You're still working for the Rainier Fruit Company? A. Yes.

Q. Did you ever know of damage to crops or trees by using any other spray than Elgetol?

A. Well, some lime and sulphur. I've lived in the valley all my life, and I've done a lot of spraying, and I've seen some burn from lime and sulphur.

Q. You have seen some damage from lime and sulphur?

A. Well, the tree might come out of it, but I believe it would hurt them to some extent; any kind of damage will hurt a tree.

(Testimony of Lawrence Liniger.)

Q. Does the time that a spray is put on have an importance?

A. Well, most of us maybe wait too darn long on some of that stuff, and that's a lot of our trouble, and we really had a lot of mildew there, especially in the Jons, and of course it was calyx time. We thought we would use it right away.

Q. Some part of the orchard, then, you sprayed twice with Elgetol in the calyx?

A. No, the second would have been about seven or ten days after, something like that.

Q. You just kept on going, turned around, and back across the orchard again with Elgetol?

A. Yes.

Cross-Examination

By Mr. Hawkins:

Q. You did not spray in the pink with Elgetol?

A. No.

Q. Either in 1944 or in 1945? A. No.

Q. In 1944 your objective was to find out the effects of this material as a thinner, is that right?

A. That's right.

Q. And generally speaking, you tried to hit it at the full bloom stage, is that right?

A. In 1944, yes, on these different trees.

Q. Did you notice any damage as the result of that application in 1944? A. No.

Q. No burn?

A. No; we did notice mildew was dried up, which I understood it was supposed to do that, and it did.

(Testimony of Lawrence Liniger.)

Q. Did you have any blossoms drop off as a result of that application in 1944?

A. Yes, but I wouldn't say that was from Elgetol, because there's a lot of the blossoms don't pollinize which will drop off anyway.

Q. In other words, the Elgetol had no effect as a thinner, is that what you say?

A. Well, we never used it again for that purpose, but I think one of them tests would have been O.K., but you would still have to thin the tree.

Q. So you gave it up as thinner?

A. That's right.

Q. And in 1945 you used it as mildew control, is that right?

A. Yes.

Q. Have you used lime and sulphur on your orchard before?

A. Yes.

Q. And when do you apply that?

A. For what?

Q. For mildew?

A. We used that in the pink. We used that in 1943, 1944, and 1945, and also 1946.

Q. Well, then, in 1945, when you were really using Elgetol as a mildew control, you started out with a sulphur and lime application, is that right?

A. Yes; that's a very light dosage, though.

Q. Then at full bloom stage you applied the Elgetol?

A. No, it wasn't in full bloom.

Q. At what stage was it?

A. Well, I would say fifty per cent or more of the petals were off when we start our calyx spray.

Q. Well, it was between the full bloom and the calyx spray, isn't that right?

(Testimony of Lawrence Liniger.)

A. Before the—what is that, again?

Q. It was between the full bloom stage and the true calyx stage, that you applied this Elgetol?

A. No, I understand the true calyx spray is when fifty per cent of the petals are off the tree.

Q. Well, isn't the calyx the apple when it is just formed, and before the end closes up? Isn't that the calyx stage?

A. Yes; well, we try—

Q. And the blooms have dropped off at that time, haven't they?

A. No, not all of them. We try to put it on when fifty per cent of the petals have dropped off the flowers.

Q. That's what you call the calyx?

A. Yes.

Q. Now, you have testified you have seen some burn from lime and sulphur. Was that a mildew application?

A. No, mostly dormant. I never used it as a mildew, other than down there.

Q. Now, as a dormant application you use a much stronger solution than as a mildew control?

A. That's right.

Q. And in applying lime and sulphur as a mildew control have you ever observed any considerable damage?

A. No, or no good, either.

Q. In your place?

A. Yes.

Q. That's right, lime and sulphur is the standard recommendation for mildew, isn't it?

A. Well, maybe it is, but that don't mean a whole lot.

(Testimony of Lawrence Liniger.)

Q. So far as you're concerned?

A. I wouldn't waste my time on it.

Q. You wouldn't waste your time on it?

A. No.

Q. Now, isn't it generally true that down below the gap the orchards are not as much infected by mildew as they are above the gap?

A. Well, I wish you were there, any of you were there, to see that at that time. I didn't know of any as bad.

Q. In other words, your answer is that it is not true; that you have it as bad there as you do in the upper valley?

A. No, we have it just as bad, I think, at that time, in 1945, and the years before that even, when there was nothing to use for it.

Q. Well, my question is very simple. Mildew, according to your testimony, is as bad below the valley as it is in the upper valley?

A. Yes, our orchard.

Q. Then when Mr. Brackett testified a few minutes ago that there was not as much of a problem as there was in the upper valley, he was not correct?

Mr. McKelvy: Just a minute; that's not proper cross-examination.

The Court: I think that calls for a conclusion. I'll sustain that.

(Testimony of Lawrence Liniger.)

Cross-Examination
(Continued)

Q. How many orchards have you operated in the lower valley? A. That's the only one.

Q. That's the only one? A. Yes.

Redirect Examination

By Mr. McKelvy:

Q. Mr. Liniger, I'm not sure about this, but what would have happened in 1945 in your Jonathans, where you had the bad mildew, if you had not used Elgetol, in your opinion?

A. Well, it had happened in years before that, all our new growth had died back.

Q. What does that mean, to those not orchardists?

A. Well, what we're after is to build new growth in those trees, and if she dies back, you won't have any new growth. Q. Don't get a crop?

A. Not as good as on new wood.

Q. Did you clean up your mildew in 1945?

A. Absolutely.

Mr. McKelvy: That's all. Mr. Liniger may be excused?

Mr. Hawkins: No objection.

(Whereupon, there being no further questions, the witness was excused.)

A. J. BECKWITH

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Would you give us your name, please?

A. Beg pardon?

Q. Your name?

A. Beckwith, A. J. Beckwith.

Q. B-e-c-k-w-i-t-h? A. Correct.

Q. Where do you live, Mr. Beckwith?

A. In Yakima.

Q. And your business? A. Fruit shipper.

Q. And with what concern are you connected?

A. George F. Joseph and Company.

Q. Are you an orchardist?

A. I have an orchard.

Q. How much of an orchard do you have?

A. Ten acres.

Q. Of what varieties?

A. Winesaps, Yellow Newtons, and Jonathans.

Q. Have you used Elgetol in the last few years at all? A. Yes.

Q. When did you first hear about it, and how did you first hear about it?

A. Oh, I heard about it, I think, the first year it came to the valley.

Q. When was that, Mr. Beckwith?

A. I couldn't say.

Q. What year did you first use it?

A. In my own orchard?

(Testimony of A. J. Beckwith.)

Q. In your own orchard, yes.

A. Two years ago.

Q. Two years ago would be 1945?

A. No, I used it three years ago, I beg your pardon; I think it was three years ago, in the summer.

Q. That, I assume, would be 1944?

A. I think so.

Q. What did you use it for in 1944?

A. I used it to check mildew.

Q. When did you apply it?

A. It was either July or August, I do not recall.

Q. In which spray?

A. A straight spray in itself, an Elgetol spray.

Q. And do you remember what mixture you used?

A. No; it was comparatively light, though, I think.

Q. Did you get any results so far as checking mildew is concerned?

A. We think we had some results, yes.

Q. And what varieties did you use it on in that year?

A. Jonathans.

Q. Now, did you use it the following year, 1945?

A. Yes.

Q. And for what purpose?

A. For thinning Yellow Newtowns.

Q. Did you have any mildew problem with the Newtowns?

A. No.

Q. When did you apply it, so far as the Newtowns are concerned?

(Testimony of A. J. Beckwith.)

A. When the calyx had fallen, approximately half fallen—when the petals had approximately half fallen.

Q. When the petals had approximately half fallen, and you applied it at that time for the purpose of thinning? A. Yes.

Q. Did you get any injury to the foliage of the trees, or any injury of any kind?

A. It seems that we observed where there was an occasional mildew shoot, mildew covered terminal, it burned that, but we had no damage, no commercial damage.

Q. What kind of results did you get so far as thinning was concerned.

A. We were very well pleased with it.

Q. Did you use it in '46, by the way?

A. Yes.

Q. On the Jonathans, or what variety?

A. No, on the Yellow Newtowns.

Q. Did you use it on anything except the Newtowns in 1945? A. No.

Cross-Examination

By Mr. Hawkins:

Q. In your Yellow Newtowns do you have a mildew problem? A. No.

Q. It is not serious. Do you have a mildew problem in your Jons?

A. Not now; there is always, in my orchard, at least, there is always a mildew problem.

Q. What do you use ordinarily, lime and sulphur?

(Testimony of A. J. Beckwith.)

A. Sulphus, both lime and sulphur and emulsified sulphur.

Mr. Hawkins: That's all.

Mr. McKelvy: That's all.

(Whereupon, there being no further question, the witness was excused.)

A. C. KNUEPPEL

called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. McKelvy:

Q. Your name is Gus Knueppel?

A. August Kneuppel.

Q. And where do you live, Mr. Kneuppel?

A. I live in Ellensburg.

Q. What's your business? A. I'm retired.

Q. And what work did you follow before you retired? A. With an orchard.

Q. When did you retire?

A. In '46, a year ago.

Q. Did you raise an orchard crop in '46?

A. No.

Q. '45 was the last year you worked on the place? A. Yes.

Q. Where is your place, Mr. Knueppel?

A. Where I'm living now?

Q. No, your orchard you had in '45?

(Testimony of A. C. Knueppel.)

A. About—well, it's on Route 2, near Thrall.

Q. That's what, east?

A. About three miles east of Thrall.

Q. And so far as Ellensburg is concerned, is it east of Ellensburg?

A. Well, it's about—I think it's southeast.

Q. About how far, would you say, from Ellensburg?

A. Eight miles.

Q. How much of an orchard did you have there?

A. Thirty acres.

Q. What varieties, sir?

A. McIntosh, Jonathans, Winesaps, Romes, Newtowns.

Q. How many years did you follow the business of an orchardist?

A. Twenty-three years.

Q. Twenty-three; did you have occasion to use Elgetol during the time you were operating this orchard?

A. Yes.

Mr. Hawkins: I would like to enter an objection, for the purpose of the record. That testimony shows that this man's orchard is in Ellensburg, a considerable distance from Yakima. There is no showing that the conditions that obtain on Mr. Knueppel's orchard are anything like the conditions obtaining on the plaintiff's orchards, and therefore we object to the testimony as being immaterial.

The Court: About how far is this from Yakima? Of course, I know, but the record doesn't show.

A. Thirty miles.

The Court: I think, however, there is an important difference here, that is, apart from the distance.

(Testimony of A. C. Knueppel.)

I think it will be conceded by both counsel that Ellensburg is not in the Yakima valley district, and is not so considered, and it seems to me we must draw the line someplace. We don't want to go to Wenatchee, Spokane, Hood River, and bring in all these orchardists who have used Elgetol with good or bad results. I am going to sustain the objection, and limit the testimony to growers in the Yakima valley area.

Mr. McKelvy: Well, of course, this is only thirty miles, your Honor, and I don't want to argue with your Honor's ruling, but I do want to make an offer of proof of what Mr. Knueppel would testify. Merely because we have some hills or canyons, there may be some difference, but I think it goes to the weight rather than the admissibility. I may say this is the last witness. I don't intend to call anybody from Hood River, or Spokane, or overburden the Court.

The Court: Well, the jury may withdraw for the offer of proof.

(Whereupon, the following proceedings were had without the presence of the jury.)

The Court: If I let you go to Ellensburg then the plaintiffs will go to Ellensburg.

Mr. McKelvy: That would be all right with me.

The Court: It wouldn't with me, though. I don't want to run this trial indefinitely.

Mr. McKelvy: Well, the Court has indicated we should limit the witnesses, which we have; this

(Testimony of A. C. Knueppel.)

is our last witness. This witness happens to have used this product right through, and you correct me, Mr. Knueppel, if I'm wrong in anything I say here, right through from the pink into and through the calyx, is that right, sir?

Witness: Yes.

Mr. McKelvy: And I therefore think, that's why we selected him, because counsel has been pointing at the fact that some witnesses here haven't used it at different times. Now, true, it's thirty miles away, and I suppose it could be argued there is some difference in the weather, I don't know, but still, in view of the position that counsel has taken that some of these witnesses haven't used it in various stages, I think that we're entitled to show what this man did. It goes to our good faith. It shows what results he had in 1944. It goes to actual information we had when these people in this case talked with Regan in 1945. Now, if your Honor feels that, I want to ask questions here, and make the offer of proof. Here we have a witness that used it in the pink, and of course that's really why the objection is made, not the thirty miles.

The Court: Well, it would be cumulative, even as to that. We've had testimony that they applied it in the pink and in what they call the calyx stage, so that it is cumulative.

Mr. McKelvy: Very little cumulative, as I recall. I think you will hear counsel argue there has been only one or possibly two witnesses who testified to that. Also there is a claim by the plaintiffs that

(Tetimony of A. C. Knueppel.)

weather doesn't affect it, and it is brought out by the plaintiffs that they did not have any knowledge whether weather affected it, so it wouldn't make any difference at that time whether it was thirty miles up the canyon or forty miles down south.

Direct Examination

(Continued)

(Offer of Proof in the Absence of the Jury.)

Q. Mr. Knueppel, when did you first use Elgetol? A. In 1944.

Q. How did you happen to use it?

A. I wanted to cut down my thinning bill, and get the thinning over with.

Q. And did you talk with Dr. Regan at that time? A. No, I didn't.

Q. Did you ever talk with Dr. Regan about the use of this product?

A. Not that I know of.

Q. When did you apply it in 1944, that is, what stage of the trees?

A. Well, I started in the pink, late pink, and I finished up, petals were off I should say about eighty per cent; not ninety per cent.

Q. Eighty or ninety per cent off? A. Off.

Q. In other words, you kept going between those two times, is that right?

A. Yes, I kept going.

Q. Spraying from the pink to the calyx; did you have any damage in 1944? A. No.

(Tetimony of A. C. Knueppel.)

Q. Did you use the product on the Jonathans in 1944? A. Yes.

Q. What other varieties did you use it on?

A. On McIntosh, Jonathans, Romes, and Newtowns, and——

Q. Now, how about 1945; did you use it in that year?

A. I used it in the same varieties.

Q. Same varieties in 1945 as 1944?

A. Yes.

Q. And when did you apply it in 1945?

A. In 1945 I applied it at the same time; like I says, it was in the pink.

Q. In the pink? A. Yes.

Q. And then kept——

A. Kept right on going until—the petals hung on in 1945 longer than they did in 1944, on account of weather conditions.

Q. Did you spray in the calyx in 1945?

A. In 1945?

Q. Did you spray in the calyx in 1945?

A. Uh huh.

Mr. McKelvy: Substantially, that's our offer, your Honor. I believe in the issues as they're framing up here that we're entitled to put that testimony in.

The Court: I don't care for argument; I just want to know if you still object.

Mr. Hawkins: Yes, I still object.

(Tetimony of A. C. Knueppel.)

Mr. McKelvy: One other question; did you get any injury, any damage of any kind in either 1945 or 1944?

A. No, I didn't.

The Court: The court is still of the opinion that this type of testimony should be limited to the Yakima valley area, and if we go to Ellensburg, it seems to me we shouldn't limit any testimony from areas just as similar. It seems to be Wenatchee is as close in some respects as Ellensburg. Sustain the objection.

Mr. McKelvy: I have not asked, because of the Court's ruling, various questions of these witnesses as to what Dr. Regan told them, but I want the record clear. As I understood it, the court ruled I could not ask that of these growers. Is that correct?

The Court: Not entirely. As I recall the way the question came up, the question was designed to bring out from the grower witness what Dr. Regan had told him as to why Dr. Regan was recommending this product, which was because Dr. Regan knew that somebody had used it in 1944 and told him it was all right. I would say you would be permitted to give testimony as to directions that were given, if any, by Dr. Regan, in order to show the manner in which it was applied, whether it was or was not in accord with the other.

Mr. McKelvy: I think we're together on it. The Court ruled we could ask what directions, that is, how much to use, but not what he said as to the past useage of the product itself.

(Tetimony of A. C. Knueppel.)

The Court: Yes, that's right.

Mr. McKelvy: All right, Mr. Knueppel, you can step down. I would like an exception to your ruling.

The Court: Yes, of course.

(Whereupon, the following proceedings were had within the presence of the jury.)

Mr. McKelvy: I assume that it is in order for us to tell the jury the court ruled that Mr. Kneup-pel couldn't testify?

The Court: Yes, of course.

Mr. McKelvy: So we had him testify in the absence of the jury, because he was from Ellensburg.

The Court: Yes, that's right.

Mr. McKelvy: With that, the defendant rests.

Mr. Hawkins: At this time the plaintiffs by way of rebuttal will call Mr. Crews.

ROBERT W. CREWS

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please, sir?

A. Robert W. Crews.

Q. And where do you live?

A. Route 1, Tieton.

Q. Is your orchard near the orchard of Mr. Emerson?
A. Just one mile straight east.

(Testimony of Robert W. Crews.)

Q. And how many acres do you have in that orchard? A. Twenty acres.

Q. Twenty acres?

A. Twenty acres of apples and pears.

Q. Of apples and pears? A. Yes, sir.

Q. Do you have any Jonathans?

A. Yes, sir.

Q. Do you have a mildew problem on your orchard, Mr. Crews? A. Yes, sir.

Q. Are you familiar with the product known as Elgetol? A. Yes, sir.

Q. Have you ever used that product?

A. Yes, sir.

Q. In what year did you use it?

A. Year of '45.

Q. In 1945; and in what way did you use the spray?

A. We used that in the pink, as a supposed control for mildew.

Q. You used it as a mildew control?

A. Yes, sir.

Q. And you sprayed in the pink?

A. Yes, sir.

Q. Did you make a second application?

Mr. McKelvy: I object to this, so we have the record straight, as not rebuttal testimony.

The Court: It will be overruled; proceed.

Direct Examination

(Continued)

Q. Did you make a second application of Elgetol, Mr. Crews? A. Partly.

(Testimony of Robert W. Crews.)

Q. And at what stage did you make that second application? A. An early calyx.

Q. And how much of your orchard did you cover with this second application?

A. I would say about ten per cent of the Jonathans and Romes, only.

Q. What result did you observe as a result of the use of Elgetol?

Mr. McKelvy: Object to the question as leading and suggestive, and assuming.

The Court: Well, what result—I'll overrule the objection. You can tell what you observed afterward.

A. We saw after we had started with the second time over that the leaves just began, or the buds of the petals started to turn brown, and it looked just as though a heavy frost, like they were frosted, and they fell off.

Q. Did you sustain any damage or loss of crop that year, 1945?

Mr. McKelvy: Object to that as not rebuttal testimony, and further, calling for speculative testimony at this time; part of the case in chief.

The Court: I'll sustain the objection, if it pertains to the amount of money damage. I think he can describe what happened to his orchard, if anything, as the result of the application of the spray.

Direct Examination

(Continued)

Q. What happened to your crop as the result of the application of the Elgetol spray?

(Testimony of Robert W. Crews.)

A. It was a loss.

Q. What strength did you apply the Elgetol?

A. The first time, one and a half pints per one hundred gallons of water, and the second time, one pint.

Q. And just for the purpose of the record, you have filed a claim with the defendant, have you?

A. That's right.

Mr. Hawkins: That's all.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Crews, what variety did you use it on?

A. Jonathans and Romes.

Q. How many of them did you spray in the so-called calyx?

A. Oh, I would say it was probably one hundred trees of each variety; no, there wasn't that many; there wasn't over seventy or seventy-five, maybe; not very many.

Q. A total of seventy-five in the calyx?

A. That's right.

Q. Got damage from those you sprayed in the calyx, too? A. How's that?

Q. Did you get some burn from the trees that you sprayed in the calyx twice? A. Yes.

Q. Did you have any trouble from the trees you sprayed only in the pink? A. Yes, sir.

Q. You had trouble from both of them?

A. Yes, sir.

(Testimony of Robert W. Crews.)

Q. Why did you stop spraying in the calyx?

A. Why did we stop?

Q. Yes.

A. Because I come back to Dr. Regan, or the spray company, to find out what the difficulty was, and they come up and said——

Q. Had you had difficulty?

Mr. Hawkins: Let the witness answer the question.

Mr. McKelvy: No, I'm not going to spread the issues.

The Court: We'll let it stand as it is; go ahead.

Cross-Examination

(Continued)

Q. My question is, what happened in the orchard? That's the question.

A. Well, it burned it, and we come back to the spray company to find out what the difficulty was, and they come up and said, "Don't put it on, it's too late."

Q. When did you first see the burn?

A. We saw the burn at the time we started to spray the calyx, but we didn't know that was what the difficulty was; we naturally assumed that Dr. Regan and the company knew what they were about.

The Court: Just answer the questions. He'll ask you plenty of questions.

Q. Did the trees that were sprayed only in the pink show any different effect than the ones that were sprayed both in the pink and in the calyx?

(Testimony of Robert W. Crews.)

A. The ones in the pink, did they show any different?

Q. Yes, was there more, or the same amount of injury, to the ones just sprayed in the pink?

A. No, the total damage seemed to be about the same.

Q. The tree that you sprayed in the calyx and the pink was just the same as the one in the pink?

A. Yes, it seems that the damage had been done prior to the calyx.

Q. Just answer the questions. You think it was done prior to the calyx? A. Yes.

Q. Did you have mildew on the Jonathans?

A. Yes, sir.

Q. Bad mildew? A. Yes.

Q. Didn't have much of a bud set, did you, on the Jonathans?

A. A bud set? Yes, it was pretty good, but the bloom after it was sprayed was different.

Q. You didn't expect much of a crop, did you?

A. Yes.

Q. On the Jonathans? A. Yes.

Q. Did it control the mildew that year, 1945?

A. No.

Q. Was it cleared up some for '46?

A. In '46?

Q. Was it better, the mildew condition better in 1946 than it was in 1945?

A. Oh, yes, we sprayed with early lime-sulphur.

Q. But it was better in 1946 than in 1945, is that right? A. Yes, sir.

(Testimony of Robert W. Crews.)

Q. How long have you been operating an orchard? A. Been operating an orchard?

Q. Yes.

A. Ever since there's been orchards in Tieton; we been there forty-six years.

Q. I suppose you know, then, that some burn and some injury occurs in 'most any spray under certain conditions?

A. I wouldn't say from 'most any spray.

Q. Well, you've heard of some injury being sustained because of using other things than Elgetol?

A. Yes.

Q. You have had some injury by using other sprays than Elgetol? A. How's that.

Q. You on your orchard have had some unsatisfactory results with other sprays than Elgetol, haven't you? A. Yes.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all, Mr. Crews. May Mr. Crews be excused at this time?

The Court: Yes, he may be excused now.

(Whereupon, there being no further questions, the witness was excused.)

H. S. RADEMACHER

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. H. S. Rademacher.

Mr. McKelvy: What's the name? I didn't get it.

A. R-a-d-e-m-a-c-h-e-r.

Q. And where do you live, Mr. Rademacher?

A. Tieton, Washington.

Q. What is your business, sir?

A. I didn't hear you.

Q. I say, what is your business?

A. I am an apple grower.

Q. You have an orchard, do you?

A. Yes.

Q. And where is it located?

A. A mile and a half northwest of Tieton City; and one in Gromore.

Q. And how long have you been engaged in the orchard business?

A. Well, I spent two years in Wenatchee, and the last twenty-six years in Tieton.

Q. You have apples in your orchard?

A. Yes.

Q. What kind of apples do you have?

A. Jonathans, Delicious, and Winesaps.

Q. And do you have a mildew problem in your orchard? A. Yes.

(Testimony of H. S. Rademacher.)

Q. What do you ordinarily use to control that mildew? A. Sulphur.

Q. When applied?

A. I usually apply a pink spray, followed with a calyx spray.

Q. When did you first hear of Elgetol?

A. 1944.

Q. And where did you get the idea of using Elgetol?

A. From the Ortho News bulletin.

Q. As a mildew control? A. Pardon?

Q. As a mildew control? A. Yes.

Q. When did you apply Elgetol as a mildew control?

A. Why, I applied it following the time for calyx. It was after the calyx time. I had some additional work forced on me in Gromore at that time, and I didn't get the calyx on, so I had to apply this spray following the usual calyx time.

Q. About how many days after the calyx?

A. I would say a week, from a week to ten days after the usual calyx time.

Q. And what was the strength in which you applied the Elgetol?

A. It was the recommended strength.

Mr. McKelvy: I move that the answer be stricken as not responsive.

The Court: It will be stricken, and the jury will disregard it.

Q. How many pints per gallon or per hundred gallons did you use? A. A pint.

(Testimony of H. S. Rademacher.)

Q. One pint?

A. Yes, that's what I started out with.

Q. And what results did you obtain from this spray?

A. Well, I noticed, I think we sprayed one day, and then we were blown out for two days, and when we got back I noticed that the leaves showed a burned ring around the outside of the leaf, and so I dropped the dosage to about two-thirds of a pint, and I continued spraying twenty acres that way over the next four or five days.

Q. And what results did you observe from that application?

A. I lessened the burning. There was burning at different parts of the orchard. I was running six guns, and the results on each one of the spray men was the same.

Q. And what were those results?

A. What was the results?

Q. Yes.

A. There was a lessened burning. Later on when we come back for the next spray, different parts of the orchard I had a drop.

Q. You had a what?

A. A fruit drop; the apples had begun to loosen up at that time, and we could blow them off readily with the pressure of the gun.

Q. And what, in your opinion, caused the apples to loosen up?

A. Well, I was of the opinion it was the burning effect of the Elgetol that loosened the apples.

(Testimony of H. S. Rademacher.)

Q. Did you notice any burn or discoloration on the stems of the apples?

A. When an apple drops, when something affects the apples so that they drop, the stem turns a pale color, or a yellow color, and the apples that are going to stay on seem to grow away from it, and it's very noticeable. You can just sense it, that something's wrong with those apples, and the least little touch on them and they fall off.

Q. Did you use Elgetol in 1945? A. No.

Q. Did you ever advise Dr. Regan of your result in 1944?

Mr. McKelvy: Object to it as not rebuttal testimony.

The Court: Well, I'll overrule it.

A. I never consulted Dr. Regan on the use of Elgetol, or I don't remember of discussing my spray troubles with him regarding Elgetol.

Mr. Hawkins: I think that's all.

The Court: The court will recess now until 1:30.

(Whereupon, a recess was taken until 1:30 o'clock p.m.)

(Testimony of H. S. Rademacher.)

Yakima, Washington, January 29, 1947

1:30 o'Clock P.M.

(All parties present as before, and the trial was resumed.)

Cross-Examination of H. S. Rademacher

By Mr. McKelvy:

Q. Mr. Rademacher, I understand that you put the Elgetol on in '44; am I right in that?

A. Yes.

Q. And you started applying it for mildew about a week to ten days after the calyx period had elapsed, is that correct? A. Yes.

Q. You've been running orchards, I suppose, for a good many years? You've been an orchardist for a good many years, have you?

A. Yes, quite a few years.

Q. How long have you been in the orchard business? A. Twenty-eight years.

Q. Forty-eight? A. Twenty-eight.

Q. Twenty-eight; I didn't mean to get you any older than you are. I suppose, then, you know when the so-called standard time for applying mildew sprays is; is that in the pink and the calyx?

A. Yes, it is.

Q. In the pink and the calyx, but by your own experience and your own judgment you decided to try it after the calyx in this particular case?

A. The wind had blown and I was delayed with other work, so I had no other thing to do but try to check it; that time was past, the best time was past, and it was still going, so I had to apply it when I could.

(Testimony of H. S. Rademacher.)

Q. I take it you hadn't been satisfied with mildew control with other sprays, is that right?

A. Yes, I had always been satisfied with sulphur.

Q. And had you ever gotten any damage from any other sprays than Elgetol, in your experience?

A. Not from mildew; I have had oil damage in the dormant spray.

Q. And that was using an oil dormant, I take it?

A. Yes.

Q. Did you talk with Mr. Emerson or Mr. Stahler or Mr. Keck in 1944 about orchard business?

A. No.

Q. Have you talked with them at all about it?

A. I met Mr. Emerson two or three times.

Q. When, first?

A. Oh, I think last summer sometime.

Q. That is, in the summer of '46, you mean?

A. Yes, last year some time, when his trial was coming up.

Mr. McKelvy: That's all. Thank you, sir.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

FRED C. MEYERS

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please, sir?

A. Fred C. Meyers.

Q. Fred C. Meyers? A. Yes, sir.

Q. And where do you live, sir?

A. Five miles west of Yakima, on Tieton drive.

Q. And what is your occupation?

A. Fruit grower.

Q. Do you have an orchard out there five miles west of Yakima? A. Yes, sir.

Q. And what do you have on the orchard?

A. Well, we have Saps, and Delicious, Jonathans, and Romes.

Q. And do you have a mildew problem in your orchard? A. Yes, sir.

Q. And do you ordinarily spray that with lime and sulphur? A. Yes, sir.

Q. Have you ever used Elgetol as a mildew control? A. Yes, sir.

Q. In what year? A. In '45.

Q. The year of 1945? A. Yes, sir.

Q. How many applications of Elgetol did you make that year? A. One.

Q. And at what stage of the bloom did you make it?

A. Well, I would say it was late calyx.

Q. Late calyx? All the petals had fallen off the tree? A. Yes.

(Testimony of Fred C. Meyers.)

Q. And what strength did you use?

A. I think if I remember right it's a pint and a half; it was what they recommended, anyway.

Q. Pint and a half to the what?

A. To the hundred.

Q. One hundred gallons of water?

A. Yes.

Q. And what effects did you observe after the application of Elgetol?

A. Well, I didn't get quite the ten acres all sprayed, I had about a half a day left, and the wind came up, and that delayed us two days, and in that time I seen I was getting an awful lot of injury, so we stopped right there.

Q. And what do you mean by injury?

A. Well, the leaves just curled like you had hit them with a blow torch.

Q. Did you have a crop that year on that part of the orchard you sprayed?

A. That was my big year for Jons.

Q. Did you get a good crop that year on the part of the crop you sprayed with Elgetol?

A. I didn't get any apples where I sprayed with Elgetol.

Q. And that part of the orchard that you did not spray with Elgetol, what crop did you get?

A. I had a good crop; same as it should be.

Cross-Examination

By Mr. McKelvy:

Q. Did you spray all of your Jonathans?

A. Absolutely.

(Testimony of Fred C. Meyers.)

Q. Did you spray any other variety?

A. I sprayed, there was a small block of Delicious, and practically the whole block of Romes, and all of the Saps except a few Saps up by the building where we hadn't finished.

Q. Did you have any mildew problem on Delicious? A. Yes.

Q. How about Winesaps?

A. Winesaps, I have it in them too; not much, but I can find it, and the same in the Romes, and plenty in the Jons.

Q. Your big trouble was mildew in the Jons, is that right? A. It's in everything.

Q. More in the Jons?

A. Yes, but then I sprayed it all.

Q. Which did you spray first?

A. Well, we generally start on the back, and on two lines, and spray straight through, and they both got in at the same time; it's a long narrow ten, and they go straight through.

Q. Jonathans was the only one where you had a drop, is that it? A. Absolutely not.

Q. Where did you have a drop?

A. I had drop on Romes and Saps and no Delicious at all.

Q. You used it in the calyx, or after the calyx?

A. It was a delayed calyx, is what it was.

Q. Delayed calyx?

A. You'd call it a delayed calyx.

Q. Well, how much delay? How long after the calyx?

(Testimony of Fred C. Meyers.)

A. Well, your petals have all dropped, and it will be a delayed calyx.

Q. Did you use it at all in '44?

A. No, sir.

Q. Did you use it as a thinner in '45?

A. No, sir.

Q. You first heard of Elgetol, I take it, in '45?

A. '45 is when I heard they were using it, so I looked into it; to see whether it was all right, and I asked different growers that had used it. One of them was Walt Gray, on Congdon Orchard, and at the warehouse they told me some of the growers on Swede Hill was using it, and they looked it up and found they had good luck the year before, and I bought it at the Farmers Supply, and asked them how much they would recommend putting on, and they called up somebody, now I don't know who they called up, and they said, if I remember right, it was a pint and a half, I won't say for sure.

Q. By inquiring about the growers you learned that they did get a good mildew control in 1944 incidental to thinning operations?

A. Well, they said they didn't get hurt. I don't know how much of a mildew kill they got.

Q. You knew that 1944 was the first year it had been used by any of the growers here in the valley, did you?

A. Yes.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all.

(Whereupon, there being no further questions, the witness was excused.)

OTTO JONES

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Otto Jones.

Q. Where do you live, Mr. Jones?

A. I live a mile and a half south of Gromore.

Mr. McKelvy: South of where?

A. One mile and a half south of Gromore.

Q. Oh, Gromore? A. Yes.

Q. And that's here in the Yakima valley?

A. Yes, it is.

Q. What is your occupation, sir?

A. I am a fruit grower.

Q. And how long have you been engaged in that line?

A. I've taken three crops off the place.

Q. And do you have an orchard at the present time? A. Yes, sir.

Q. And how long have you had that orchard?

A. Three years.

Q. Do you have a mildew problem on your orchard?

Q. What varieties do you have in your orchard?

A. I've got Jonathans and Winesaps.

Q. Just those two varieties? A. Yes, sir.

Q. And you have a mildew problem in both of those varieties? A. Yes, sir, I do.

Q. Have you ever used Elgetol to help you in your mildew problem? A. Yes, sir, I have.

(Testimony of Otto Jones.)

Q. In what year did you use Elgetol?

A. In 1945.

Q. What strength Elgetol did you use?

A. I used one pint to the one hundred gallons of water in the pink spray, and I used one-half pint to the hundred gallons of water in the calyx spray.

Q. You applied the Elgetol twice, then?

A. Yes, sir.

Q. Once in the pink, and once in the calyx?

A. That's right.

Q. And what effect did Elgetol have upon your orchard?

A. Well, it burned my leaves, burned the apples until they dropped off the blossom, the buds, burned some of the buds until they didn't even open after they was in the pink.

Q. And did you have a good crop that year, in '45?

A. No, sir I didn't. I got four thousand boxes off of seventeen acres of solid Jons.

Q. And in your opinion that was caused by the use of Elgetoll?

A. I'm positive it was the cause.

Q. I didn't hear you?

A. I'm positive that was the cause. It couldn't have been anything else, only the Elgetol.

(Testimony of Otto Jones.)

Cross-Examination

By Mr. McKelvy:

Q. What did you use for mildew in the Jons in 1944?

A. I used lime-sulphur.

Q. And was there any particular reason to change from lime-sulphur to Elgetol in '45?

A. So I could get in quicker with oil; I had a codling moth problem.

Q. You had learned that some growers had used the product in the valley in 1944?

A. I had heard that, yes.

Q. And you knew that they had used it as a thinner, and found that incidental to thinning, it was a good mildew control?

A. I had heard that they had used it as a thinner, and was getting mildew control out of it.

Q. The standard time or recommendation for applying a spray for mildew is in the pink and in the calyx, is that right?

A. Yes, sir.

Q. And you applied it in those two times?

A. Yes, sir.

Q. Now, did you know any neighbors or other growers who had a small crop of Jonathans in 1945, that did not use Elgetol?

A. That had a small crop?

Q. Yes.

A. Not in the locality where I live, no.

Q. Matter of fact, there were quite a few; it was rather prevalant that Jonathans were pretty slack

(Testimony of Otto Jones.)

in 1945 if they weren't treated for mildew, is that right?

A. No, all the Jonathans was good on this hill where I live in 1945.

Q. Did you have quite a bit of mildew in your Jonathans?

A. I had quite a bit, yes.

Q. Enough that the mildew would have affected the crop, isn't that right?

A. It might have; I might have got some culls out of it if I hadn't used some kind of mildew control.

Q. Did you get a good crop of Jons in 1946?

A. Fairly good.

Q. How many boxes did you get off of them?

A. I got eight thousand, a little better than eight thousand—pardon me, in what year?

Q. 1946.

A. I got a little better than eight thousand boxes.

Q. That was a pretty good crop?

A. Fairly good. I got a little over nine thousand in 1944.

Q. That was the first year you farmed up there?

A. It is, yes.

Q. Do you still have mildew trouble in your Jonathans?

A. Yes, sir, I do.

Q. And it's quite a problem, isn't it, the Jons?

A. Well, I'd sooner not have it.

Q. Did you use Elgetol at any time in '46?

A. In '46?

(Testimony of Otto Jones.)

Q. Yes.

A. No, I didn't use any Elgetol in '46.

Q. Did you ever get burned, get some injury, by using other sprays than Elgetol?

A. No, sir, I haven't.

Q. How long have you been in the orchard business?

A. Well, I've only owned an orchard just three years. I have sprayed, though, the past five or six years, worked in orchards.

Q. Did you first notice your trouble in this particular year after the pink spray?

A. Yes, I noticed some of the trouble.

Q. You what?

A. I noticed that they was burned some after the pink spray.

Q. But then you went ahead and covered all of it with calyx?

A. Yes; I really didn't believe they was burned bad enough to quit on it after the pink spray, and I knowed neighbors that was going ahead that I figured had more burn than I had.

Q. With Elgetol?

A. They was burned with Elgetol.

Q. You did not stop with calyx; you covered all the calyx, all the Jonathans? How about the Saps?

A. I just started in the Saps, and just sprayed part of one line, is all I sprayed.

Q. Did it make any difference in the Saps, the ones you sprayed with calyx and the ones you didn't?

(Testimony of Otto Jones.)

A. Well, the ones that I sprayed had less than half a crop. They had quite a few apples on them, but less than half a crop. Where I had perfect bloom, where there was good crop, where I did not spray.

Q. You mean both sprays?

A. No, I didn't spray the Saps in both sprays; that was in the calyx.

Q. You didn't put a pink on the Saps at all?

A.. No.

Q. What stage of the calyx were they in?

A. Well, they was about, I'd say sixty or seventy-five per cent of the blossoms that had dropped off.

Q. Did it do a thinning job, too?

A. Well, it thinned those, all right; thinned plenty of them off.

Q. Did you have in mind a thinner?

A. No, sir.

Q. You knew it had been used as a thinner?

A. I knew it had been used as a thinner, but I wasn't intending to thin with it. The way I got it, on thinning, when the king blossom had dropped off, that was the time to thin, and I thought this was later than that stage.

Q. You knew how it thinned?

A. I had heard, yes; I never thinned that way.

Q. But you knew the principle of the thinning, it had to kill some of these buds? A. No.

Q. Did the trees that had the most mildew get the most damage?

(Testimony of Otto Jones.)

A. No, the most vigorous trees I had on the place was the ones that got hurt worst. It was in a low place, what I put it, two rows; more moisture in this low place. There was the most healthy Jonathans I had on the place, and it burned them so much it really injured the trees.

Q. The tree was damaged?

A. Yes, the trees was damaged, and it didn't get any leaf on them the whole summer.

Mr. McKelvy: That's all.

Redirect-Examination

By Mr. Hawkins:

Q. In your experience in spraying apple trees for mildew with lime and sulphur, have you ever experienced a burn like you did that year in 1945 with Elgetol?

A. I never have.

Mr. Hawkins: That's all. May Mr. Jones be excused?

Mr. McKelvy: No objection.

(Whereupon, there being no further questions, the witness was excused.)

MILES GIBSON

called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. Miles Gibson.

Q. Where do you live, Mr. Gibson?

A. Three miles west of Selah.

Q. What business are you in?

A. Orchardist.

Q. Do you have an orchard out near Selah?

A. Yes.

Q. How many acres do you have there?

A. Twenty.

Q. Twenty? A. Twenty.

Q. And what is that acreage planted to?

A. Mostly apples.

Q. What varieties?

A. Well, there's Winesaps, Jonathans, Delicious Staymens, and a few Arkansas Black.

Q. Do you have a mildew problem in your orchard? A. I do in the Jonathans.

Q. Did you ever use Elgetol, Mr. Gibson?

A. I did.

Q. What year? A. '46.

Q. '46? A. '45; excuse me.

Q. 1945. What strength Elgetol did you use in 1945?

A. Well, on the pink I used a gallon and a half to a thousand gallons of water.

Q. And what did you use in the calyx?

A. I used one gallon.

(Testimony of Miles Gibson.)

Q. You applied two Elgetol sprays to your Jonathans, did you? A. Yes.

Q. And what was the effect of Elgetol on your orchard? A. It destroyed the crop.

Q. Did it do anything to the leaves of the trees?

A. It burned most of the foliage.

Q. I believe you also have a suit pending against the California Spray-Chemical Corporation, isn't that right? A. I do.

Mr. Hawkins: I think that's all. You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. Mr. Gibson, as I recall it, as you testified in your case, you used this product in the full bloom, didn't you, just after the petals had started to fall?

A. I first applied Elgetol after ninety per cent of the petals were fallen, when you gently shake the branch and most of the petals would fall off.

Q. That's when you applied it so far as the calyx is concerned?

A. That's when I first applied it.

Q. Oh, first applied it; didn't you use it in the pink? A. No.

Q. Let's see——

A. Well, that's what I call my pink spray, but when I come to put it on the pink, the water was off, then the water come back on, the full bloom stage was on, and I waited until after then to apply it.

Q. Now, let's get this straight.

A. You hashed that all over in the other trial.

(Testimony of Miles Gibson.)

Q. Pardon?

A. You hashed that all over in the other trial.

Q. I know we did, but this jury didn't hear it.

A. What?

Q. But this jury didn't hear it; in the other trial, you say, the other jury did. What did you call your pink, now; when did you apply what you call your pink spray?

A. After full bloom stage, which is not a true pink spray.

Q. Yes; then that was Jonathans? A. Yes.

Q. And when did you apply what you call the calyx? A. Ten days later.

Q. And at that time the petals were pretty well gone, I guess? A. They were.

Q. Were gone. I take it you went over once and then just about started over again.

A. That's about right.

Q. Close together?

A. The first tree that I had started in first was hit ten days later with the next spray.

Q. What kind of weather did you have that spring?

A. It was mostly humid, damp, rainy weather.

Q. You knew that Elgetol had been used in '44 here in the valley only, didn't you? A. Yes.

Q. And you knew that it had been used by some growers as a thinner, and they had noticed that it was a good mildew control?

A. That's right.

(Testimony of Miles Gibson.)

Q. Now, isn't a standard time or recommendation for putting on a mildew spray, whether it be Elgetol or sulphur or something else, in the pink, in the true pink, and in the calyx?

A. That's right.

Mr. McKelvy: That's all.

Mr. Hawkins: That's all, Mr. Gibson.

(Whereupon, there being no further questions, the witness was excused.)

W. B. DOWDY

called as a witness on behalf of the plaintiffs, in rebuttal, being duly sworn, testified as follows:

Direct Examination

By Mr. Hawkins:

Q. Will you state your name, please?

A. W. B. Dowdy.

Q. And where do you live, sir?

A. I live now here in Yakima.

Q. And have you ever been engaged in the orchard business?

A. Yes, I have, and since 1920, until just a few days ago, when I sold my ranch, just last week.

Q. And where was your orchard located?

A. Three miles northwest of Selah.

Q. What varieties do you have on your orchard?

A. I have Winesaps, Jonathans, Delicious, a few Newtowns, and pears.

(Testimony of W. B. Dowdy.)

Q. Do you have a mildew problem in your orchard?

A. Yes, there is some mildew in 'most all the varieties, but particularly the Jonathans.

Q. Have you ever used Elgetol to help control the mildew?

A. I did in '45.

Q. And what strength of Elgetol did you use?

A. In the pink spray I used a pint and a half.

Q. To a hundred gallons?

A. To the hundred gallons, and in the calyx spray I put in one gallon to the thousand gallon tank, which would be eight-tenths pint; a gallon can in a thousand gallon tank.

Q. And what effect did these two applications of Elgetol have on your orchard?

A. Well, on most of the trees I had a very few apples; very light crop. An occasional tree there would be a fair crop. I got seven hundred boxes that year off of my Jonathans. In '46 I got thirty-five hundred. That's about a comparison.

Q. Thirty-five hundred in 1946, and seven hundred in 1945?

A. That's right.

Q. What did you get in 1944?

A. I don't remember just exactly, but it would be somewheres around three thousand.

Q. Around three thousand. In your opinion, did Elgetol do that damage?

A. Well, if it didn't, I wouldn't know what else did. I'd blame it on the Elgetol.

Q. The injury and burn, that followed immediately the application of the Elgetol?

(Testimony of W. B. Dowdy.)

A. Well, I didn't notice it for several days after I made the application. I couldn't see very much injury before I put on my calyx spray, or I wouldn't have went ahead with it, but it seemed to be all right. I put on the calyx, but I didn't finish the calyx spray before this injury began to show up, and of course I quit immediately.

Mr. Hawkins: You may cross-examine.

Cross-Examination

By Mr. McKelvy:

Q. I understand you used one and a half pints in the pink? A. That's right.

Q. And you testified at the Gibson trial that you used one pint in the pink? A. In the pink?

Q. Yes, sir. Didn't I ask you this question—this question was asked by Mr. Hawkins——

A. Well, it seems to me—my memory is that I used a pint and a half.

Q. "What strength of Elgetol did you use?" Answer: "Well, I made two sprays. With the pink I used at the rate of one pint to the hundred." Did you answer that way at that time?

A. Well, that would be ten pints.

Q. Ten pints to a thousand gallon tank. Well, isn't it a fact you don't remember or didn't know exactly what you used?

A. No, I knew exactly at the time what I was using; there's no question about that. It's possible that I may have forgotten now, but it seems to me, my memory was I used a pint and a half in the first cover in the pink.

(Testimony of W. B. Dowdy.)

Q. I see; all right. And you have an orchard that has sort of a perpetual mildew, in the Jonathans, anyway?

A. Well, I've always had mildew in my Jonathans, that's right.

Q. That's what I mean; and you have had to spray quite regularly for it?

A. I spray every year for it.

Q. And you have used sulphur before 1945?

A. I use sulphur, that's right.

Q. And you had heard that Elgetol had been used by some growers in 1944 as a thinner and that it cleaned up mildew, hadn't you?

A. Yes, I first heard of it at the Horticultural meeting that previous winter.

Q. You first heard of Elgetol when you attended the Horticultural meeting here in Yakima in December, 1944?

A. That's right.

Q. And who was talking there, any representative of the California Spray-Chemical Company?

A. Not that I recall now.

Q. Well, other growers were making talks, weren't they?

A. Yes.

Q. Charley Rowe made a talk about it?

A. Yes.

Q. And he said he had fine results with it in 1944?

Mr. Hawkins: I object to this line of testimony; it's going pretty far afield.

The Court: Overrule the objection.

(Testimony of W. B. Dowdy.)

Cross-Examination

(Continued)

Q. You may answer.

A. Well, Charley, as I remember it, was talking about the Elgetol as a thinning spray, and he noticed that it was apparently controlling his mildew, and I figured if it controlled his mildew it might control my mildew.

Q. And Charley Wright said the same thing, made the same kind of a talk, at that same meeting?

A. Well, I don't remember about Charley Wright.

Q. You know who Charley Wright is?

A. Charley who?

Q. Wright.

A. Well, I don't recall him just now. I remember Charley Rowe, particular.

Q. Well, there were other growers talking about it that had used it in 1944, regardless of the name?

A. Well, I remember Charley Rowe, is the one man I remember talking about it.

Q. Now, why were you interested in using Elgetol after you had attended this meeting, instead of sulphur the old stand-by you used for years?

A. Well, there's several reasons for that. Anyone who has used sulphur very much doesn't want to use it if he can possibly find anything else.

Q. Why?

A. Well, it's a very offensive spray to use, in the first place, it's difficult to handle, it's a dirty spray,

(Testimony of W. B. Dowdy.)

and the second reason is that if you use sulphur you can't follow in your calyx or first covers with oil.

Q. Well, did you have any desire to be able to follow with oil?

A. Sure, you want to use your oil as an ovicide for codling moth and codling moth eggs.

Q. Is there something else you could use instead of oil?

A. Well, not as an ovicide, that I know of.

Mr. McKelvy: That's all; thank you, sir.

Mr. Hawkins: I think that's all.

(Whereupon, there being no further questions, the witness was excused.)

[Endorsed]: No. 11634. United States Circuit Court of Appeals for the Ninth Circuit. J. D. Keck and Harry K. Stahler, and E. A. Emerson and Lewis Emerson, Husband and Wife, Appellants, vs. California Spray-Chemical Corporation, a Corporation, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed May 22, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11634

J. D. KECK and HARRY K. STAHLER and E.
A. EMERSON and LEWIS EMERSON, Hus-
band and Wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, a Corporation,

Appellee.

STIPULATION FOR SUPPLEMENTAL
TRANSCRIPT OF RECORD

It Is Hereby Stipulated by and between the parties to the above-entitled causes by and through their respective attorneys, that the United States Circuit Court of Appeals for the Ninth Circuit shall supervise and secure printed as a Supplemental Transcript of Record in the above causes the transcribed stenographic record of evidence of the following named witnesses: Reporter's transcript of evidence excepted by appellant, Record, Pages 169-226; 289-293; 301-335; 347-357, including Robert W. Crews, H. S. Rademacher, Fred C. Meyers, Otto Jones,

Miles Gibson, W. B. Dowdy, Cecil C. Clark, Edward Ketcham, David H. Shuman, Lawrence Liniger, D. W. Brackett, A. J. Beckwith, A. C. Knueppel and the Bill of Particulars on file in said causes; and Plaintiffs' Exhibits B, F, and the label on Exhibit J; and said Supplemental Transcript of Record shall be and remain a part of the record of said causes, and each of them, to the same extent as that heretofore printed and designated "The Transcript of Record"; and costs therefore shall be and become costs taxable in said causes.

Dated August 5, 1947.

/s/ W. R. McKELVY,
SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN.

By /s/ A. P. CURRY.

BROWN & HAWKINS,
By /s/ KENNETH C. HAWKINS.

[Endorsed]: Filed Aug. 11, 1947.

No. 11634

IN THE

***United States Circuit Court
of Appeals***

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and
LEWIS EMERSON, husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANTS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

FILED

OCT 21 1947

PAUL P. O'BRIEN,
CLERK

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS

Post Office Address:
Box 437

Office Address:
626 Miller Building
Yakima, Washington

Attorneys for Appellants

SUBJECT INDEX

	Page
STATEMENT OF THE CASE.....	3
QUESTIONS PRESENTED.....	7
SPECIFICATIONS OF ERROR.....	7
ARGUMENT	7
LIABILITY OF SELLER FOR BREACH OF WARRANTY..	9
LIABILITY OF SELLER FOR TORT IN THE SALE OF A PRODUCT.....	10
THE WASHINGTON CASES.....	14

TABLE OF CASES

Baxter vs. Ford Motor Co., 168 Wash. 456, 12 P. 2d, 409, 15 P. 2d, 1118.....	15, 23
Bock vs. Truck & Tractor, Inc., 18 Wash. 2d, 458, 139 P. 2d, 706.....	12, 16
Cochran vs. McDonald, 23 Wash. 2d, 348; 161 P. 2d, 305....	19
Dobbin vs. Pacific Coast Coal Co., 25 Wash. 2d, 190; 170 P. 2d, 642.....	21
Ebers vs. General Chemical Co., 310 Mich. 261, 17 N. W. 2d, 176.....	11, 12, 24
E. I. Du Pont de Nemours & Co. vs. Baridon, 73 F. 2d, 26 (CCA 8th Circuit).....	11, 24
Kramer vs. Carbolineum Wood Preserving Co., 105 Wash. 401; 177 Pac. 771.....	17
Mazetti vs. Armour & Co., 75 Wash. 622; 135 Pac. 633.....	9, 11, 14

STATUTES

U. S. C. A., Title 28, Sec. 225 (a).....	2
--	---

No. 11634

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and
LEWIS EMERSON, husband and wife,

Appellants,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,

Appellee.

BRIEF OF APPELLANTS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

NAT. U. BROWN
KENNETH C. HAWKINS
BROWN & HAWKINS

Post Office Address:
Box 437

Office Address:
626 Miller Building
Yakima, Washington

Attorneys for Appellants

BRIEF OF APPELLANTS

These actions were commenced in the Superior Court of the State of Washington in and for Yakima County, but were removed by the Appellee, the defendant below, to the District Court of the United States for the Eastern District of Washington, Southern Division, since the amount involved exceeded Three Thousand Dollars (\$3,000.00), and the defendant was a corporation of the State of California, whereas the plaintiffs were residents of the State of Washington.

The two causes were consolidated for trial and for appeal by stipulation and order. (R. 268-9).

The cases were tried before the Honorable Samuel M. Driver, Judge of said United States District Court at Yakima, Washington, on January 27, 28 and 29, 1947, before a Jury. (R. 22 et seq.).

After both parties had rested, the defendant challenged the sufficiency of the evidence and moved for a direct verdict, which motion was granted and the Jury was directed to return a verdict in favor of the defendant. (R. 262-267). Subsequently, judgment was entered on the verdict and thereafter a motion for new trial was filed and overruled. (R. 268, 9; 272, 3).

Notice of Appeal was filed by the plaintiffs on the 16th day of April, 1947. (R. 283). The record of Appeal was certified by the Clerk of the District Court on the 19th day of May, 1947. (R. 292). The jurisdiction of this court is invoked under Sec. 128 of the Judicial Code as amended, 28 U. S. C. A., Sec. 225 (a).

STATEMENT OF THE CASE

Appellants are owners and operators of apple orchards in the Yakima Valley, State of Washington. These orchards are planted principally to Jonathan and Delicious apples. (R. 29, 153, 154).

The appellee, California Spray-Chemical Corporation is a wholesaler of spray materials in the Yakima Valley. It does not engage in the retail business, but sells only to other distributors and retailers. (R. 176, 7). It maintains a staff of field representatives, who are trained men with years of education and experience in connection with the problems of spray and spray materials. (R. 25). These men are employed for the purpose of advising the growers of the valley on problems of spray procedure, formulas and programs, and "to put out reliable information to our users" (R. 211), and for the purpose, of course, of stimulating the sale of the products handled by the California Spray-Chemical Corporation. (R. 25). The head or chief of this staff is Dr. Regan, an entomologist by education and by experience, who likewise is employed to give such advice to growers and to organize appellants' program of approach to its market. (R. 25). Although the appellee does not sell directly to the user of this spray material, that is, the grower, but only to other distributors and retailers, its field representatives contact the growers personally, advising with them personally, concerning their particular problems on their orchards and giving advice and recommendations concerning the products handled by the appellee. (R. 25, 211, 212). The company also reaches

out to the grower by means of a little periodical called the Ortho News (R. 211).

In the April 17, 1945, issue of Ortho News (Pls. Exhibit B) it is said: "Whenever in doubt or where a special spray schedule is desired to meet unusual conditions, consult our nearest office or your 'Ortho Field Service Man.' "

In the spring of the year 1945, while the trees were still dormant, both appellants decided that their orchards needed some protection from mildew (which had not yet affected their crops materially but might do so in a few years if left uncontrolled) (R. 65, 66, 67, 122, 123, 132). Appellants contacted a representative of the Yakima Valley Farmers' Supply Company, a retail concern, about mildew control and the use of a product known as "Elgetol 30" in that connection. (R. 33).

"Elgetol 30" is not manufactured by the appellee but by the Standard Agriculturists, Inc., of Hoboken, New Jersey. It is a di-nitro material designed as a dormant spray and is therefore a stronger or more caustic spray than one used after the blossoms have commenced to bud out. The manufacturer cautions the user, if in doubt, whether the trees are still in a dormant stage, to consult with his dealer or experiment station before spraying. (R. 107; Pls. Ex. J.).

The standard treatment used for years in the Yakima Valley for the control of mildew is the so-called lime and sulphur spray applied in the "pink" stage of the blossoms, and again applied in the "calyx" stage. (R. 109). The disadvantage of the

lime and sulphur spray is that it delays the application of the summer oil spray, one of the methods used in the control of the codling moth. (R. 93, 211. Pl's Ex. B).

The representative of the Yakima Farmer's Supply Company referred appellants to Dr. Regan of the California Spray-Chemical Corporation. Dr. Regan recommended the use of "Elgetol 30" as an effective mildew control. (R. 33, 124).

Pursuant to such recommendation, the appellants purchased "Elgetol 30," secured directions from Dr. Regan on its application and applied the same in the "pink" stage to their apple trees. (R. 32, 33, 75). Within a few days appellants observed some burn upon the new leaves and some of the blossoms, and became worried concerning the further application of Elgetol. Appellant requested Dr. Regan to come to his orchard. Dr. Regan surveyed the orchards and advised appellants that the Elgetol was working fine and that the little burn that was apparent was merely evidence that the Elgetol was attacking the mildew and destroying it, and *specifically advised it be applied again in the Calyx*. (R. 32-40; 124-128).

Appellant relied upon such recommendations and instructions and again applied Elgetol in the "calyx" stage and within a very short time thereafter and as a result of the application of said spray, blossoms on the trees were burnt brown, the leaves to a large extent was destroyed and the crop of that year very materially reduced. (R. 39-40; 128).

Appellants read the Ortho News and relied upon the recom-

mendations and representations therein contained as well as the oral representations of Dr. Regan in the use of Elgetol. (R. 75, 80, 124) (Ex. F).

The evidence showed that the appellants did not buy the Elgetol directly from the California Spray-Chemical Corporation, but from a retailer who had purchased it from the California Spray-Chemical Corporation. (R. 32, 33, 75, 176, 177). The evidence also showed that the application of Elgetol in the "pink" and in the "calyx" as a mildew control had never been tested in the Yakima Valley or any place else prior to 1945, (S. R. P. 1 et seq.) and in that year, when it was first used as a mildew control a heavy loss was sustained throughout the Valley. Elgetol had been used only one year before in the Valley and then as a chemical thinner, not as a mildew control, and was applied at a different stage of the bloom. (R. 110, 188, 187, 190, 236, 293, 294, 296, 297, 298, 299 and 105, and Sup. R. P. 1 et seq.) When used as a chemical thinner Elgetol was applied not at the "pink" or "calyx" stage of the blossom, but at full bloom stage after the king blooms (the principal bloom in each cluster) had set fruit, but before the remaining blossoms had set for the purpose of destroying the unset blossoms and thus rendering thinning by hand later in the season unnecessary. (R. 93, 94, 96, 99, 101, 239). Testimony showed that with a material of this kind it was necessary to test the same for a period of from three to five years in order to determine its true characteristics, and to know whether it is safe. (R. 90, 109, 110, 119, 103).

QUESTIONS PRESENTED

1.

In an action for damages for loss of apple crop for negligence in recommending and selling a spray as a mildew control at a time when the appellee knew or should have known that the product was dangerous and knew that the product had not been tested for a sufficient number of years to determine its characteristics, can there be a recovery against a wholesaler *with whom plaintiff is not in privity* where the wholesaler directly contacts the plaintiff and recommends and represents the product to be suitable for the purpose intended, which product was manufactured for a wholly different purpose?

SPECIFICATIONS OF ERROR

1.

The court erred in directing a verdict in favor of the defendant.

2.

The court erred in denying appellants' motions for a new trial.

3.

The court erred in entering a judgment for the appellee.

ARGUMENT

It is the position of appellants that under the facts and cir-

cumstances set forth above appellee is liable to appellants notwithstanding lack of privity of contract.

The trial below, and this appeal is predicated upon the proposition that the defendant was negligent in recommending and selling Elgetol and giving instructions as to the use thereof as a mildew control at a time when it knew or in the exercise of reasonable care should have known that the product was unsafe for such purpose.

It is our position that by going into the field and contacting the growers and recommending and representing to the growers Elgetol as a mildew control, the appellee, California Spray-Chemical Corporation, assumed the duty to use due care and that when appellants purchased Elgetol indirectly from the appellee and used it according to appellee's instructions and relied upon appellee's recommendations, representations and instructions, the lack of a direct contractual relationship between the parties does not bar appellants' action. The court below found that under such circumstances notwithstanding the representations of appellees and appellants' reliance thereon and notwithstanding the fact that appellants knew or in the exercise of reasonable care should have known at the time such representations were made that the product was dangerous and wholly unsafe to use for the purpose recommended, there must be direct contractual relationship in order to affix legal liability upon the appellee. It was for that reason that the court directed a verdict in favor of the appellee, entered judgment and overruled appellants' motion for new trial. (R. 263 et seq.).

LIABILITY OF SELLER FOR BREACH OF WARRANTY

Had appellants sued appellee solely upon breach of warranty, then it would have been incumbent on appellants to prove a direct contractual relationship between the parties, for a warranty necessarily implies a contract of some kind. The leading case on this subject in the State of Washington is the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633. In this case the court laid down the rule in the State of Washington to be:

“It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.”

Were appellants claiming breach of warranty, then, of course, there could be no recovery, unless the case comes within one of the exceptions. However, it should be borne in mind that a seller may be held liable either on the theory of negligence or on the theory of breach of express warranty. It is on the theory of negligence that appellants rely, not warranty.

The third exception stated in the *Mazetti* case is, of course, actually not an exception, but the alternative rule here contend-

ed for, namely, that the seller may be liable for negligence as well as breach of warranty, and, in such case, privity is beside the point, for a tortious act does not necessarily depend on the existence of a contract. Therefore, the cases holding that privity is essential for an action upon breach of warranty are not applicable to the case at bar.

II.

LIABILITY OF SELLER FOR TORT IN THE SALE OF A PRODUCT

As pointed out in the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, the seller is liable where the defendant has been guilty of fraud or deceit or where the defendant has been negligent with respect to the sale of the articles sold even though there is no privity of contract.

There are two cases applying this rule, which are, in our opinion, decisive of the case at bar. These two cases are *E. I. Du Pont de Nemours & Co. vs. Baridon*, 73 F. 2d 26 (CCA 8th Circuit) and *Ebers vs. General Chemical Co.*, 310 Mich. 261, 17 N. W. 2d 176.

In the Baridon case, the Du Pont Company manufactured and marketed a patented product known as "Semesan" which it advertised as a seed disinfectant. The plaintiff heard an agent of defendant recommend the semesan for the treatment of gladiolus bulb and bulblets and had read Du Pont's literature advocating such use. The plaintiff purchased semesan from a dealer and used it upon his bulbs. These bulblets were virtually de-

stroyed. The court held that there could be liability even though there was no privity of contract. The court said:

“The defendant, however, contends that, because its product was intended to affect only plant life, and property alone was subject to injury, it owed no duty to the plaintiff, *since it had no contact with him*. With that contention we do not agree. Through its *advertising and literature the defendant had expressly invited the plaintiff and other growers to use its product for the purpose of disinfecting bulbs and bulblets, and, since it had undertaken to direct the manner in which it should be used, the user had a right to assume that the company had exercised such care as an ordinarily prudent manufacturing chemist would usually have used in giving the directions for the use of such a product*, and had not knowingly prescribed a use which would destroy their plants.

“A rule which would permit a manufacturing chemist, who offered his product to the public for use in the treatment of plants or animals, to so carelessly prepare his product or to so carelessly direct the manner in which it was to be used as to destroy or injure the property of one who purchased it from a dealer and who in ignorance of its dangers used it for its intended purpose and in accordance with the directions of the manufacturer, and which would deny to the persons whose property was injured any redress, although the destruction of his property was the natural, probable, and almost certain consequence of the manufacturer’s negligence, *should not, we think, receive the sanction of this or any other court*. Our conclusion is that a manufacturer of a proprietary product intended for the specific purpose of preventing or curing the diseases of plants, animals, or human beings, which product when properly used for its intended purpose is either harmless or beneficial, but which when improperly used will cause or is likely to cause material injury, who undertakes to direct or recommend the manner in which it shall be used, owes the duty to those whom the manufacturer, through its advertising and representations, invites to purchase and use the product, of exer-

cising reasonable care commensurate with the dangers involved in giving such directions and in the making of such recommendations. The manufacturer is not an insurer that in every instance and under all circumstances no injury will result from the use of his product as directed or recommended, but *if he knows or in the exercise of reasonable care should know that if his product is used as directed or recommended it will cause or be likely to cause, material injury, then he is liable to any person who, in reliance upon his representations, directions and recommendations, uses the product for the purpose and in the manner directed and recommended by the manufacturer and who suffers injury as a direct result*, unless it appears that the user also knew or in the exercise of reasonable care should have known that the use of the product would be injurious or would be likely to cause the injuries complained of.” (Italics ours)

The material facts of the case at bar are on all fours, except that in the case at bar the appellee is not the manufacturer. Under the circumstances this makes no difference. *Bock vs. Truck & Tractor, Inc.*, 18 Wash. (2d) 458, 139 P. (2d) 706.

We call the court's attention to the fact that the spray material used by appellants was manufactured solely as a dormant spray. The appellee took this product and, through its own agents, recommended that it be used after the dormant stage, during the "pink" stage and the "calyx" stage, at which time the blossoms are subject to destruction by such a spray.

In the Ebers case (17 N. W. 2d 176) the plaintiff purchased through a dealer a spray material manufactured and distributed by the defendant and applied the same upon his peach trees in order to control the peach tree borer. The defendant had recommended the product as a control of peach tree borer. The

plaintiff had relied upon that recommendation and had used the material upon his trees causing their injury. The trial court directed a verdict for the defendant, as in the case at bar, on the grounds that there was no privity of contract. The Supreme Court of Michigan reversed the court holding that privity was not necessary to recovery. There was evidence that the material had been tested in Georgia where it worked very well, but that it had not been tested in Michigan. There was evidence that the use of the material in Michigan was injurious to the trees. The court said:

“This was a representation by defendant that, if used as directed, its product E-D-E was safe and would not kill peach trees. If it was negligent in placing such product on the market in Michigan without proper field tests to determine its effect on peach trees in this State, or if it gave improper directions for the use and application of the product, it cannot escape responsibility for such negligence merely by adding a disclaimer of warranty to its representation of safety. Although plaintiff claims under the theory of an implied warranty, the real question is whether or not defendant was negligent. * * * Defendant further contends that it cannot be held liable because there was no privity of contract between it and plaintiff. * * * *Under such representation and with knowledge that its product was inherently dangerous, it was defendant's duty to use reasonable care and precaution to protect ultimate purchasers and users, including plaintiff, from injury.*” * * *

What caused the injury to plaintiff's trees? Was it caused by the product E-D-E, or by weather conditions, or by other factors? The testimony of the several entomologists indicates that they were uncertain as to the cause of the injury. If it is determined that the injury was caused by E-D-E, then the further question arises as to whether or not defendant was negligent in distributing such product in Michigan without proper field tests having been made in this State to

determine its effect on peach trees. * * * Such questions of fact should have been submitted for jury determination.”

It is quite clear that the facts adduced by the appellants in the case at bar bring them within the ruling of the two cases just discussed. The trial court conceded that the two cases were sound authority for the position taken by appellants, but that he was bound by the law of the State of Washington which required privity. (R. 263-5).

III.

THE WASHINGTON CASES

It is our position that the law pronounced by the Ebers case and the Baridon case is also the law of the State of Washington. An examination of the cases involving privity decided by the Supreme Court of the State of Washington will show that it has not yet been confronted with a case such as the case at bar. An analysis of the principal Washington cases will, we believe, show that upon presentation to the Supreme Court of the State of Washington of a case similar to the case at bar, the same law will be applied as was applied in the Ebers and Baridon cases. We will now consider the principal Washington cases on the subject.

As pointed out above, the Mazetti case (75 Wash. 622) on which the court below relied clearly holds that in the event of fraud or negligence in the sale of a product the seller may be liable though not in privity with the plaintiff.

A case which comes decidedly close to the case at bar is the

case of *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12 P. (2d) 409, 15 P. (2d) 1118. In that case the plaintiff purchased a Ford automobile from a Ford dealer. When driving the car a pebble was thrown against the windshield, breaking the same and injuring the plaintiff's eye. Plaintiff brought suit against the Ford Motor Company and offered to prove that the car was sold with the representation that the windshield would not fly or shatter, which statement was made by the Ford Motor Company through its literature. The trial court excluded the evidence and sustained a challenge to the sufficiency of evidence. In granting a new trial, the court said:

“Since the rule of caveat emptor was first formulated, vast changes have taken place in the economic structures of the English speaking peoples. Methods of doing business have undergone a great transition. Radio, bill boards and the products of the printing press have become the means of creating a large part of the demand that causes goods to depart from factories to the ultimate consumer. *It would be unjust to recognize a rule that would permit manufacturers of goods to create a demand for their products by representing that they possess qualities which they, in fact, do not possess; and then, because there is no privity of contract existing between the consumer and the manufacturer, deny the consumer the right to recover if damages result from the absence of those qualities, when such absence is not readily noticeable.* * * * *The rule in such cases does not rest upon contractual obligations, but rather on the principle that the original act of delivering an article is wrong, when, because of the lack of those qualities which the manufacturer represented it as having, the absence of which could not be readily detected by the consumer, the article is not safe for the purposes for which the consumer would ordinarily use it.*

It is, of course, true that the Baxter case involves a manufacturer where of course the case at bar involves a distributor. It is also true that the Baxter case involves a personal injury where in the case at bar we have injury to crops. These differences we submit are not material and have no real bearing on the fundamental questions here involved. Where the distributor recommends the use of a product for some other and different purpose than the one for which it was manufactured, the distributor in effect takes the position of manufacturer and becomes responsible for its use.

In the case of *Bock vs. Truck & Tractor, Inc.*, 18 Wash. (2d) 458, 139 P. (2d) 706, a dealer in second-hand motor vehicles undertook to overhaul and recondition a car which later injured a third party. The court said:

“The question presented by these facts is whether, under such circumstances, the third person may recover from the dealer damages for personal injuries sustained by reason of the defective condition of the truck. * * * We have declared, however, that a *manufacturer* of motor vehicles may be held liable, to one purchasing a *new* automobile from the manufacturer’s regular dealer, for breach of the manufacturer’s warranty concerning the nature of certain equipment upon the vehicle. *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12P (2d) 409, 15P (2d) 1118, 88 A. L. R. 521: * * * The question with which we are now more particularly concerned is whether, upon a set of facts such as are stated in the complaint herein and admitted by demurrer to be true, a dealer in used, or secondhand, motor vehicles, may be held liable to a third person for injuries caused by the defective condition of such vehicle. * * * It must be conceded that there are some earlier cases which hold contrary to the decisions and texts from which we have

previously quoted. The opposing view is rested upon lack of privity or upon the argument that to adjudicate liability in cases not founded upon contractual rights would subject manufacturers and dealers to unreasonable burdens and would create a source of unconscionable litigation. *Those cases, however, are not in harmony with the principle now firmly established in this state, that liability of the instant nature does not rest upon a contractual obligation, but upon tort for a wrong committed. Baxter vs. Ford Motor Co., supra. * * * such duty rests not upon a contractual obligation, but rather on the principle that the delivery of a motor vehicle lacking in those qualities which the dealer represents it to have, or impregnated with defects which render the vehicle unsafe for its intended use and which defects the dealer could have ascertained by the exercise of reasonable care, constitutes an actionable wrong as to all those who suffer injury therefrom. * * ** It goes without saying, of course, that the wrong is the more pronounced and reprehensible where the sale of the motor vehicle is accompanied by positive representations by the dealer that the vehicle has been completely overhauled and reconditioned, is fit and safe and proper for operation upon the highways, and carries a guaranty of safety and fitness."

It will be seen that from the foregoing that the decision of the Bock case is to the effect that the ruling in the Baxter case is not limited solely to manufacturers. It is also to be noted that liability exists for negligence as well as for fraud and deceit in the State of Washington *even though there be no privity*. It is also to be noted that there is no allegation of fraud in the complaint in the Bock case.

In the case of *Kramer vs. Carbolineum Wood Preserving Co.*, 105 Wash. 401, 177 Pac. 771, the plaintiff purchased material from the Portland Seed Company distributed by the defendant and applied the same to his prune orchard and suffered a loss of

a number of trees. There was no showing that the defendant had been guilty of any negligence in the manufacture or sale of the product. There was no showing that the product had not been tested. There was no showing that the defendant had made any recommendations or representations concerning the product. There was no showing that the defendant's representative had contacted the plaintiff and recommended the use of the product. The court in sustaining a directed verdict said:

"The appellant relies upon the case of *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 19156140, 48 L. R. A. (N. S.) 213. * * * It is at once apparent that the Mazetti case does not sustain a recovery in this case, for this case does not fall within any one of the exceptions named there. The Avenarius Carbolineum is not shown to be of a noxious or dangerous kind. It was not shown that the respondent had been guilty of fraud or deceit in passing off the article, or that the respondent had sold, or ever had possession of, the article purchased by the appellant; *and it was not shown that the respondent had been negligent in any respect with reference to the sale of the article* purchased by the appellant and used upon his fruit trees. Not coming within any of these exceptions, the general rule must apply, that, where there is no privity of contract between the appellant and the respondent with reference to the sale of the Avenarius Carbolineum, no liability exists against the respondent."

We cite this case to point out to the court that the Supreme Court of the State of Washington in refusing to allow recovery in the Kramer case did not do it on the ground that injury to property was involved rather than injury to the person, nor did the court place its ruling upon the ground that the defendant was not a manufacturer, but placed it upon the ground that

there was no showing that the defendant had ever made any recommendations or representations to the plaintiff and *upon the ground that there was no showing that the defendant was guilty of any negligence in connection with the product.*

Another principle case in the State of Washington is the case of *Cochran vs. McDonald*, 23 Wash. (2d) 348; 161 P. (2d) 305. The Winterine Manufacturing Company manufactured an anti-freeze; it did not do business in the State of Washington and was not a defendant in the case. The Winterine Manufacturing Company sold the antifreeze in original containers to the defendant who in turn sold the antifreeze to the service station from which the plaintiff purchased the antifreeze. The label on the antifreeze guaranteed that if the product was used as directed it would not cause damage. The plaintiff used the product and his motor was ruined. The plaintiff sued the defendant who was a distributor, not on the theory of negligence, but first, on the theory of express warranty, and secondly, on the theory of implied warranty. The court held that there could be no liability on the part of the defendant to the plaintiff for the reason that there was no privity of contract. The court dismissed the theory of express warranty (printed on the container) for the reason that there was no evidence that plaintiff adopted the warranty and said "by merely selling the goods he does not accept the manufacturer's warranty as his own."

The court dismissed plaintiff's contention with regard to breach of implied warranty on the theory that there was no

privity of contract and that the case did not come within any exception of the Mazetti case. The court said:

“The respondent purchased the antifreeze from the manufacturer, and each gallon quantity was in a sealed container. It was covered by an express warranty of the manufacturer. *There was nothing about the article to indicate that it would be dangerous when used for the purpose intended, and respondent had no reason to anticipate it was not as represented by the warranty.* The respondent was not called upon to analyze or test the antifreeze before selling it to the dealers in that class of goods. *There was nothing which even remotely put him on inquiry as to its quality or condition.*”

It is to be observed at once that the situation presented in the Cochran case is distinguishable from the case at bar. In the case at bar the product was not covered by an express warranty from the manufacturer. The fact that the product was manufactured as a dormant spray and had been previously employed as a bloom killer or thinner would, the jury could find, definitely indicate to the appellee that it would be inherently dangerous when used in the “pink” and in the “calyx” for a different purpose. Appellee therefore had every reason to anticipate that trouble might result from its recommended use of the product. Certainly under the evidence the jury could have so found. *The point here is that the appellee, even though a wholesaler, directly contacted the ultimate purchaser and recommended the use of the spray material for a purpose wholly different from that for which it was manufactured.* Since appellee recommended the use of the spray as a mildew control and not as a dormant spray and since appellee undertook to write formulae for the use of the product and instruct on the strength of ap-

plication and time and manner of application, appellee was very definitely called upon under the cases above cited to find out about the product before recommending it to the growers as a mildew control. In the Cochran case just cited the defendant did not recommend and direct the use of the anti-freeze for some other purpose. The defendant therefore in that case was not called upon as the court said to test the product; nor was there any contention or any evidence introduced in the Cochran case to the effect that defendant was negligent in any respect. The privity doctrine was properly applied in the Cochran case but the ruling in that case, because of the difference in the salient facts, is not applicable to the case at bar.

In the case of *Dobbin vs. Pacific Coast Coal Co.*, 25 Wash. (2d) 190, 170 P. (2d), 642, the Round Oak Company manufactured a furnace which was sold to the Pacific Coast Coal Co., the defendant. The defendant as a distributor sold for cash the furnaces to the Allied Home Appliances which in turn sold the furnace to a contractor by the name of Tucker who in turn sold the furnace, installed in a house, to the plaintiff.

The issues had been framed and the case tried in the court below on the theory of breach of implied warranty of fitness. After the conclusion of the trial and on the plaintiff's motion for new trial, plaintiff for the first time contended that the defendant Pacific Coast Coal Company had been guilty of fraud. The Supreme Court pointed out that although there was no allegation of fraud in the complaint and although there was nothing

in the 350 pages of the trial record to indicate that the trial court or the parties considered fraud an issue.

“Nevertheless, we feel that, under our rules and former decisions, the trial court had the right to hold that an issue of fraud was created by the evidence.”

The trial court had entered a judgment in favor of the plaintiff holding that there had been a fraud in passing off a furnace. The Supreme Court in reversing the judgment of the trial court found that there was no fraud, and that, since there was neither fraud nor negligence, there was no exception to the privity rule as stated in the *Mazetti* case within which the plaintiff could come. The court said:

“But, in our comparatively early decision in *Mazetti vs. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, Ann. Cas. 1915C, 140, 48 L. R. A. (NS) 213, it is pointed out that where there is no contractual privity, a manufacturer may, under certain states of fact, be held liable in a tort action. * * * In the recent very comprehensive and useful opinion cited by the trial court in its memorandum decisions (*Bock vs. Truck & Tractor, Inc.*, 18 Wn. (2d) 458, 139 P. (2d) 706), an extended quotation is made from Judge Cardozo’s opinion in the case of *MacPherson vs. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, Ann. Cas. 1916C, 440, L. R. A. 1916 F, 696. It is said in the opinion ‘There is no claim that the defendant knew of the defect and willfully concealed it. . . The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.’

“The Bock case relies largely upon *Flies vs. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855, 60 A. L. R. 357, which was plainly a negligence case, and, although there was some consideration of alleged false representations in

the Bock case, *it was in fact decided on the theory of negligence*. See paragraph (5) of the opinion in 18 Wn. (2d) at page 475."

In discussing the case of *Baxter vs. Ford Motor Co.*, 168 Wash. 456, 12 P (2d) 409, 15 P (2d) 1118, the court in the Dobbin case said:

"It is clearly the opinion of the court that, if the plaintiff in that case could prove, by clear, cogent, and convincing evidence, (1) that the Ford Motor Company issued catalogues representing that the windshields of their cars were nonshatterable; (2) that plaintiff saw and read those representations; (3) that he purchased a car of that make in reliance upon them; and (4) that the windshields of the car shattered upon a slight impact, by which shattering he was injured, he would be entitled to a recovery against the manufacturer on the ground of fraud, although there was a complete lack of contractual privity."

There was no evidence of negligence or that the Pacific Coast Coal Company recommended that the furnace be used for some other different purpose than the one intended by the manufacturer. The only evidence of fraud was a circular put out by the Pacific Coast Coal Company but there was no testimony that the plaintiff ever saw or relied upon the representation contained in the circular. The court said:

"We have checked and rechecked the record, and we find the appellant is correct in saying that there is no evidence whatever therein that the plaintiff saw the circular until long after he had purchased the Tucker house. It is, therefore, obvious that no finding of fraud could be predicated on any representation in Exhibit A, even if false. Proof of reliance upon a false representation is an indispensable element in a fraud action."

It is apparent that the Dobbin case is not contrary to the Ebers (*Ebers vs. General Chemical Co.*, 310 Mich. 26, 17 N. W. (2d) 176) or the Baridon (*E. I. Du Pont de Nemours & Co. vs. Baridon*, 73 F (2) 26) cases, but expressly recognizes the theory of those cases, namely, that when the wholesaler is guilty of negligence in passing off the article, there may be liability even though there is no privity of contract. The point again is that in the Dobbin case the defendant wholesaler was not contacting the user directly and recommending and instructing in the use of the product which was manufactured for an entirely different purpose without properly testing the same for the new purpose, whereas we do have those facts in the case at bar.

From an examination of the foregoing cases it is apparent that a case such as the Ebers case or the Baridon case or such as the case at bar, has never been presented to the Supreme Court of the State of Washington. The nearest to these cases is the Baxter case and the Bock case which cases have not been overruled by subsequent cases, but have been quoted and relied upon by subsequent cases. A careful analysis shows that when the Washington Court is presented with a case such as the case at bar it will follow the rule in the Ebers case and the Baridon case, namely, that where a distributor recommends directly and personally to the user there will be liability notwithstanding lack of privity of contract either where there has been representations which were not true or where there has been negligence. We believe that there were sufficient facts introduced to go to the Jury. The appellee should not be permitted to go to the

growers personally recommending the product and directing the use of it and then escape liability for false representation or for negligence, as the case may be, upon the grounds of lack of privity. We respectfully submit that appellants are entitled to have their cases go to the Jury.

The court below stated, in effect, he would have submitted the case to the Jury on the authority of the Ebers and the Baridon cases, but felt that the Washington law was to the contrary. We are convinced that a careful analysis of the Washington cases clearly shows not only that the law of the State of Washington is not opposed to the Ebers and Baridon cases but on the contrary is in harmony therewith, and that when the Washington court is submitted a case such as this it will say, as was said in the Baridon case:

“A (contrary) rule . . . should not, we think, receive the sanction of this or any other court.”

We respectfully submit that the trial court erred in granting the motion for a direct verdict, in entering judgment thereon for the defendant, and in failing to grant appellants' motion for new trial.

Respectfully submitted,

KENNETH C. HAWKINS

NAT U. BROWN



No. 11634

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and LEWIS EMERSON, husband and wife,
Appellants,

v.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,
Appellee

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION

SKEEL, MCKELVY, HENKE,
EVENSON & UHLMANN,
W. R. MCKELVY,

Attorneys for Appellee
914 Insurance Building,
Seattle 4, Washington

FILED
NOV 18 1947

INDEX

	Page
QUESTIONS INVOLVED IN THE CASE.....	1
STATEMENT OF THE CASE.....	1
ARGUMENT:	
The Evidence	3
Washington Common Law Precludes Action.....	8
Appellants' Two Authorities.....	18
Assuming a Duty, There Is No Negligence.....	21
Risk Assumed	24
Damage Not Foreseeable.....	28
No Evidence Dr. Regan Did Not Exercise the Degree of Skill and Diligence Required of Men of His Profession	31
CONCLUSION	34
APPENDIX	36

TABLE OF CASES

Baxter v. Ford Motor Co., 168 Wash. 456; 12 P.(2d) 409	10, 12, 20
Bell v. Adler, 11 S. E.(2d) 495; 63 Ga. A. 473.....	22
Borg-Warner Corp. v. Heine, 128 F.(2d) 657 (U. S. C. A. 6th).....	18, 21
Bock v. Truck & Tractor, Inc., 18 Wn.(2d) 458; 139 P.(2d) 706	11, 13
Cliff v. Cal. Spray Chem. Co., 257 Pac. 99; 83 Cal. 424	21
Cochran v. McDonald, 23 Wn.(2d) 348; 161 P.(2d) 305	11, 14

Dobbin v. Pacific Coast Coal Co., 25 Wn. (2d) 190; 170 P. (2d) 642.....	11, 13, 16
Ebers v. General Chemical Co., 310 Mich. 261; 17 N. W. (2d) 176	18, 21
E. I. Du Pont de Nemours & Co. v. Baridon, 73 F. (2d) 26 (C. C. A. 8th).....	18
Ellis, et al., v. Lindmark, et al., 177 Minn. 390; 225 N. W. 395	20
Erie R. R. Co. v. Tompkins, 304 U. S. 64; 82 L. ed. 1188	9
Flessher v. Carstens Pkg. Co., 93 Wash. 48; 160 Pac. 14	11
Flies v. Fox Bros. Buick Co., 196 Wis. 196; 218 N. W. 855; 60 A. L. R. 357.....	18
Foster v. Ford Motor Co., 139 Wash. 341; 246 Pac. 945	14, 20
Geisness v. Scow Bay Co., 16 W. (2d) 1; 132 P. (2d) 740	12
Giberti v. James Barrett Mfg. Co., 266 Mass. 70; 165 N. E. 19.....	18
Hanson v. Washington Water Power Co., 165 Wash. 497; 5 P. (2d) 1025.....	33
Hill v. Great Northern Life Ins. Co., 186 Wash. 167; 57 P. (2d) 405.....	31
Hollingsworth v. Midwest Serum Co., 183 Iowa 280; 162 N. W. 620.....	23
Howatt v. Cartwright, 128 Wash. 343; 222 Pac. 496.....	33
Jacquot v. Farmers Straw Gas Producer Co., 140 Wash. 482; 249 Pac. 984.....	13
Jordan v. Skinner, 187 Wash. 617; 60 P. (2d) 697	31, 33

Kalash v. L. A. Ladder Co., 34 P. (2d) 481; 1 Cal. (2d) 229.....	21
Kolberg v. Sherwin-Williams, 93 Cal. App. 609; 269 Pac. 975	20
Kramer v. Mills Lumber Co., 24 F. (2d) 313 (U. S. C. A. 8th)	18
MacPherson v. Buick Motor Co., 217 N. Y. 382; 111 N. E. 1050	12, 14, 16
McCaffrey v. Mossberg & G. Mfg. Co., 23 R. I. 381; 50 Atl. 651; 91 Am. St. Rep. 637; 55 L. R. A. 822.....	10
McGee v. Bennett, 72 Ga. A. 271; 33 S. E. (2d) 577.....	23
Marsh v. Usk Hardware Co., 73 Wash. 543; 132 Pac. 241.....	11
Marsh Wood Products Co. v. Babcock & Wilcox, 240 N. W. 393; 207 Wis. 209.....	18
Mazetti v. Armour, 75 Wash. 622; 135 Pac. 633 (1913)	9, 19
Murphy v. Plymouth Motor Co., 3 Wn. (2d) 180; 100 P. (2d) 30	14
Murphy v. Sioux Falls Serum Co., 44 S. D. 421; 184 N. W. 252	20
Nelson v. West Coast Dairy Co., 5 Wn. (2d) 284; 105 P. (2d) 76	11
Patton v. Texas P. & R. Co., 179 U. S. 658; 45 L. ed. 361	30
Ray v. Burbank & Jones, 61 Ga. 505; 34 Am. Rep. 103.....	22
Sherwood v. Lax & Abowitz, 259 N. Y. S. 948; 145 Misc. 578; Aff. 262 N. Y. S. 909; 238 App. Div. 799.....	18
Shipp v. Davis, 25 Ala. App. 104; 141 So. 366.....	18

	Page
Smith v. Beard, 56 Wyo. 375; 110 P.(2d) 260.....	33
Smith v. Boston & M. R. R., 87 N. H. 246; 177 Atl. 729	33
Sperling v. Miller, 47 N. Y. S.(2d) 191.....	18
Stevens v. Allis-Chalmers Mfg. Co., 151 Kan. 638; 100 P.(2d) 723	18
Stewart v. Larkin, 74 Wash. 681; 134 Pac. 186.....	13
Tacoma v. Tacoma Light & Water Co., 16 Wash. 288; 47 Pac. 738.....	13
The Tom Lysle, 48 Fed. 690 (D. C. W. D. Penn.).....	33
Thomas v. Inland Motor Freight, 190 Wash. 428; 68 P.(2d) 603	32
Thomas v. Winchester, 6 N. Y. (2 Selden) 397; 57 Am. Dec. 455	11
Thornton v. Dow, 60 Wash. 622; 111 Pac. 899 (1910).....	9, 16
Tompkins v. Quaker Oats Co., 239 Mass. 147; 131 N. E. 456	17
Ultramares Corp. v. Touche, 255 N. Y. 170; 174 N. E. 441; 74 A. L. R. 1139.....	17
Webster v. Romano Engineering Corp., 178 Wash. 118; 34 P.(2d) 428.....	13
Weiser v. Holzman, 33 Wash. 87; 73 Pac. 797.....	11
Windram Mfg. Co. v. Boston Blacking Co., 131 N. E. 454; 231 N. Y. 18.....	17
White v. Natl. Bank of Commerce, 99 Cal. App. 519; 278 Pac. 915.....	20
Young v. Parke Davis & Co., 49 Pa. Super 29.....	23

TEXTS

46 Am. Jur. 557, Sec. 377.....	24
--------------------------------	----

No. 11634

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. D. KECK and HARRY K. STAHLER, and E. A. EMERSON and LEWIS EMERSON, husband and wife,

Appellants,

v.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation,

Appellee

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT OF
WASHINGTON SOUTHERN DIVISION

SKEEL, MCKELVY, HENKE,
EVENSON & UHLMANN,
W. R. MCKELVY,

Attorneys for Appellee
914 Insurance Building,
Seattle 4, Washington

QUESTIONS INVOLVED IN THE CASE

Was defendant entitled to a directed verdict when the evidence disclosed the plaintiffs purchased a spray material from a third party, which had been handled by defendant as a distributor and wholesaler, applied it to their apple trees and claimed a crop loss, the spray being intended only for agricultural use and the plaintiffs having determined to apply the particular spray material upon being told by defendant, and others, that it had effected satisfactory mildew control the previous year; no other representation being made, and admittedly no cause of action existing in fraud or breach of warranty? The Trial Court held defendant was entitled to a directed verdict.

STATEMENT OF THE CASE

Two causes of action have been consolidated for trial and appeal (R. 268). The plaintiffs claim their 1945 apple crop was damaged as a result of application of a spray called Elgetol 30. It was made by an eastern manufacturer, was handled by defendant as a distributor and was not sold to plaintiffs by defendant but through a local retail dealer. The basis of plaintiffs' suit is alleged negligence in suggesting the use of the product as a mildew control spray to be applied in the so-called "pink" and "calyx" blossom time in the spring

of 1945; contending defendant should have anticipated the injury that occurred to plaintiffs' crop. The Trial Court granted defendant's motion for a directed verdict on the ground that, under the law of the State of Washington, a buyer, admittedly having no cause of action in fraud or misrepresentation, can have no remedy in negligence against a manufacturer or dealer not the immediate vendor unless the article is dangerous to life or limb. Judgment was entered in favor of the defendant and plaintiffs have appealed.

The judgment of the Trial Court must be affirmed for two reasons: First, because the law of the State of Washington precludes recovery for negligence in manufacture or sale of an article against one not in privity with the vendee where fraud is not involved and the article is one which presents no human peril. Secondly, assuming a duty existed, no negligence was proved in this case.

ARGUMENT THE EVIDENCE

Appellants premise their case primarily on statements, both verbal and printed, made in the spring of 1945, as to the use of "Elgetol 30" as a mildew control, claiming defendant to be guilty of negligence in "recommending" the material as a "pink" and "calyx"

spray in prescribed solutions without testing it for such purpose for a period of three to five years (Appellants' Brief, Page 8).

The evidence shows appellee furnished Elgetol 30 as distributor thereof in Yakima Valley for the first time in 1944 on specific request of local growers who had learned the spray had been used successfully in the east as a commercial thinning agent (R. 182, 191, 213). A number of growers in Yakima Valley used the material for thinning in 1944 with various degrees of success for such purpose with no damage. Its use for this purpose showed a marked mildew control (R. 65, 299, 317, 336). These observations were passed on to the growers by appellee and others (R. 58, 63, 91, 113, 114, 220). As a result, many growers used Elgetol 30 for mildew control in 1945, some with satisfactory results (R. 108, 173, 313, 318, 334, 343), others, including these appellants, claiming injury (R. 108).

Apple growers in this particular vicinity have two serious problems and for both of which they have been constantly seeking new remedies. One is "thinning" (R. 56, 90, 103), the other is "mildew" (R. 91, 114, 142). Apple blossoms come in clusters of five or six and it is necessary to thin the tree to reduce the apple bearing to one apple per blossom cluster (R. 101, 177). Generally, this has been done by hand, which, during the

war period, presented a great problem because of expense and more particularly because of labor shortage (R. 90, 183). If the trees are delayed in thinning, the excess apples grow too large, which in turn affect the quality and kind of crop and the next year's crop (R. 103, 142, 183). The process of chemical thinning is to spray the blossoms at a time when the main or "king" blossom has become pollinized but before the other blossoms have been; the idea being to prevent pollinization of all blossoms except the king in each cluster (R. 101). There are three stages of blossoming, the "pink" (and pre-pink) (R. 34) when the blossoms have not opened up, but show pink; the "full bloom," when the first or king blossom has fully opened and its petals have just begun to fall (R. 101, 134); and the "calyx," when 50 per cent or more of the petals have fallen (R. 202, 221, 319, 343, 373).

Elgetol 30, manufactured by an eastern concern, had been used for commercial thinning in the east since about 1939 with reported success (R. 90, 107, 116). The orchardists heard of this use and demanded the product (R. 182, 213). Appellee obtained the product in time for use in the spring of 1944 or during the 1944 blossom period. A number of growers used it for commercial thinning in this season, applying it generally from the blossom period into the calyx period

with various degrees of success but no damage (R. 65, 135, 173, 299, 318, 336, 343). The only complaint was of underthinning (R. 181).

Appellee had, prior to the war, maintained a staff of experienced and trained fieldmen. It had been the practice of these men not only to advise with the growers concerning spray and other materials but to carry on experiments of new materials themselves. These experiments were conducted in private orchards, the grower giving the company permission to block off part of his orchard and the new agents were applied directly by or under the supervision of appellee (R. 97). During the war period, the staff of appellee in this area was reduced to Dr. Regan, an entomologist, and another with a third traveling over several states (R. 96). Experimentation necessarily had to be practically discontinued. The company did, however, attempt to carry on some experimental work through the growers, by supplying the growers with the material and checking the results (R. 98). In 1944 a few such experiments were carried on with Elgetol 30 as a commercial thinner (R. 97). A number of growers, including appellant Emerson (R. 59), also tried it out for thinning. It was found this use resulted in an effective control of mildew infestation in the trees (R. 99, 135, 173, 298, 336). Mr. Reeves, of the United States Department of

Agriculture, and Mr. Luce, the extension agent (appellants' expert witnesses) had like experience in tests they carried on with the material (R. 91, 113, 114).

Mildew is a fungus (R. 87, 93) which attacks apple trees, chiefly the Jonathan, Delicious, Rome and Wine-sap varieties. It causes a serious marking or deterioration of the fruit, making it of low grade, and affects the terminal growth of the trees (R. 66). The trees need this terminal growth to continue to produce (R. 66) and so, over a period of time, mildew will cause a serious crop reduction. The standard remedy for mildew control had always been lime and sulphur solution (R. 182) applied in the pink (and pre-pink) and calyx stage of the blossoms (R. 92, 100, 143, 185). Lime and sulphur was objectionable to the orchardist because he could not apply necessary summer oil sprays in the calyx and cover sprays for coddling moth and other insects for a period of 30 days following after using it (R. 68, 93, 136, 211). Summer oil sprays can be applied almost immediately or at most within 10 days after the use of Elgetol (R. 211). Therefore, when the information spread that Elgetol had shown good results as a mildew control when used as a thinning agent, the orchardists were most anxious to try it on their trees in the season of 1945 when mildew was particularly bad in the district (R. 114).

Knowing the serious problem this mildew infestation was to the growers, appellee published its observations in two articles in a pamphlet entitled "The Ortho News," which it distributes to the growers (R. 25). These articles suggested that if the spray be used for mildew control, it be applied in the pink and calyx time and suggested a formula for its solution (Exhibits B, C; R. 26, 28). We have included these articles in the appendix to this brief. It is admitted that no representations other than the purport of these published articles were ever made to appellants or any other growers in the district (R. 138, 145, 188). So far as time of application is concerned it is universally recognized that to get the best results, mildew control sprays must be applied in the pink and calyx periods (R. 99, 109, 143, 186).

It is the appellants' contention appellee is liable for injury resulting to their crops that followed the use of the spray material by reason of making statements, as set forth in the aforesaid printed articles, without first carrying on experiments with its product for a period of three to five years.

WASHINGTON COMMON LAW PRECLUDES ACTION

The Trial Court in giving its reasons for granting appellee's motion for directed verdict, concisely stated

the applicable rule of common law in the State of Washington (R. 262, 267). The Washington common law must be applied by the Federal Courts.

Erie R. R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188.

The general rule, early adopted in this state, that a contractor, manufacturer or vendor is not liable to third parties, who have no contractual relation with him, for negligence in constructing, manufacturing or sale has certain well defined exceptions. These exceptions are set forth in the case of *Mazetti v. Armour* 75 Wash. 622; 135 Pac. 633 (1913).

“It has been accepted as a general rule that a manufacturer is not liable to any person other than his immediate vendee; that the action is necessarily one upon an implied or express warranty, and that without privity of contract no suit can be maintained; that each purchaser must resort to his immediate vendor. To this rule, certain exceptions have been recognized: (1) Where the thing causing the injury is of a noxious or dangerous kind; (2) where the defendant has been guilty of fraud or deceit in passing off the article; (3) where the defendant has been negligent in some respect with reference to the sale or construction of a thing not imminently dangerous.”

The appellants claim to come within the third exception. This exception was very definitely defined in an earlier case, *Thornton v. Dow*, 60 Wash. 622; 111

Pac. 899 (1910). The exact language of the above quotation is found in this case as a quotation from *McCaffrey v. Mossberg & G. Mfg. Co.*, 23 R. I. 381; 50 Atl. 651; 91 Am. St. Rep. 637; 55 L. R. A. 822. The case of *Thornton v. Dow* involved injuries to spectators to an exhibition where the balcony fell in a newly constructed Armory building in Seattle. The suit was against the contractor who built the Armory. The court denied recovery to the plaintiff and, with reference to this third exception to the general rule of no liability of the manufacturer, stated:

“The third class of cases, said the court in the case we have just been reviewing, relating to the sale of a thing not in its nature dangerous, rest upon the principle that in such thing there is no general or public duty, but only a duty which arises from contract out of which no duty arises to strangers to the contract. It will be seen in this case that there was a contractual relation between the builders—the owners of the armory and the contractors, which ended with those two parties.”

Therefore, the general rule of nonliability of the manufacturer or seller to one not in privity was definitely adopted in this state. The exceptions have been restricted specifically to instrumentalities that involve a human peril.

Baxter v. Ford Motor Co., 168 Wash. 456; 12 P.(2d) 409;

Bock v. Truck & Tractor, Inc., 18 Wn.(2d) 458; 139 P.(2d) 706;

Cochran v. McDonald, 23 Wn.(2d) 348; 161 P.(2d) 305;

Dobbin v. Pacific Coast Coal Co., 25 Wn.(2d) 190; 170 P.(2d) 642.

In the *Mazetti* case, the Court allowed recovery of damages suffered by reason of impure food manufactured by the defendant and served by the plaintiff in his restaurant. While property damages were allowed, and this is generally the rule in these cases, the Court specifically restricts the rule to instrumentalities of human peril.

The first exception referred to in the rule set out in the *Mazetti* case has from early times concededly applied to articles such as poisons and explosives that are of themselves inherently dangerous to life and limb.

Weiser v. Holzman, 33 Wash. 87; 73 Pac. 797;

Marsh v. Usk Hardware Co., 73 Wash. 543; 132 Pac. 241;

Thomas v. Winchester, 6 N. Y. (2 Selden) 397; 57 Am. Dec. 455.

This exception has had universal application in this state to the sale of food.

Nelson v. West Coast Dairy Co., 5 Wn.(2d) 284; 105 P.(2d) 76;

Flessner v. Carstens Packing Co., 93 Wash. 48; 160 Pac. 14;

Geisness v. Scow Bay Co., 16 Wn.(2d) 1; 132 P.(2d) 740.

These cases all recognize a tort liability founded on public policy holding the manufacturer responsible for a duty voluntarily assumed.

Geisness v. Scow Bay Co., supra.

The cases sometimes speak of liability as a breach of warranty and other times as negligence. Judge Chadwick in the *Mazetti* case refers to this fact and considers it not important.

The last decision in this state, *Dobbin v. Pacific Coast Coal Co.*, supra, specifically calls it "negligence."

The *Mazetti* case was decided in 1913. In 1916, Judge Cardoza, while on the New York Court of Appeals, rendered his justly famous decision, *MacPherson v. Buick Motor Co.*, 217 N. Y. 382; 111 N. E. 1050; Ann. Cases 1916C 440; L. R. A. 1916F, 696. In this case the doctrine of liability for the manufacture of an instrumentality inherently dangerous to life and limb was extended to those made so by the negligence of the manufacturer or dealer; bringing within this first designated exception, found in the *Thornton* and *Mazetti* cases, the automobile cases.

Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.(2d) 409;

Bock v. Truck & Tractor, Inc., 18 Wn.(2d) 458;
139 P.(2d) 706.

The *Baxter* case admittedly can be justified on the ground of fraud as well as the theory of a dangerous instrumentality. It involved the case of an automobile with advertising as to the non-shatterable quality of the windshield. (See opinion in the case of *Dobbin v. Pacific Coast Coal*, 25 Wn.(2d) 190; 170 P.(2d) 642.

It must be remembered that fraud in the State of Washington is any false representation of the material fact susceptible of knowledge.

Tacoma v. Tacoma Light & Water Co., 16 Wash.
288; 47 Pac. 738;

Webster v. Romano Engineering Corp., 178
Wash. 118; 34 P.(2d) 428;

Jacquot v. Farmers Straw Gas Producer Co.,
140 Wash. 482; 249 Pac. 984.

Knowledge of the falsity of the statement on the part of the declarant is not essential. It is only essential in the expression of an opinion as the basis of fraud.

Stewart v. Larkin, 74 Wash. 681; 134 Pac. 186;

Webster v. Romano Eng. Corp., 178 Wash. 118;
34 P.(2d) 428.

The case of *Bock v. Truck & Tractor, Inc.*, 18 Wn.(2d) 458; 139 P.(2d) 706, involved the sale of a second-hand car represented to have been completely over-

hauled and safe to operate on the highway. The Court quotes extensively from *MacPherson v. Buick Motor Co.*, 217 N. Y. 382; 111 N. E. 1050, specifically adopting the rule of that case.

“ ‘The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser . . .

“ ‘We hold then, that the principle of *Thomas v. Winchester* (6 N. Y. 397, 57 Am. Dec. 455) is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.’ ”

See also:

Foster v. Ford Motor Co., 139 Wash. 341; 246 Pac. 945;

Murphy v. Plymouth Motor Co., 3 Wn.(2d) 180; 100 P.(2d) 30;

In *Cochran v. McDonald*, 23 Wn.(2d) 348; 161 P. (2d) 305, the plaintiff suffered injuries to his automobile by the use of antifreeze distributed by defendant

and purchased from a service station. In denying liability, the court said:

"It seems to us in the final analysis of the situation the only basis upon which recovery on the part of the appellant against respondent could be sustained is upon the application of the doctrine of the food cases cited. This field has been so fully covered by our own cases that we find it unnecessary to cite or review those from other jurisdictions. The other cases are in conflict, and neither the courts nor the text writers have been able to reconcile them. When our food cases are critically examined, it will be found that the rules pronounced in them are exceptions to the general rules of the law of sales. The position taken was justified on the ground that, when such an article as food for human consumption is considered, a question of health is involved, and public policy and the ends of social justice demand a rule be applied that will aid in the protection of health.

. . . There is no question of public policy involved in this case, nor can it be said that it is necessary in order to promote social justice to apply the doctrine of the food cases to the facts of this case. There is no question of public health involved because of consuming an unwholesome or poisonous article of food. . . .

We feel that, as no question of public policy is involved, and the reasons for the exception to the general rule of implied warranty in the law of sales applied in the food cases are absent, we would not be warranted in extending the rule of the cases cited to this case and in holding that a wholesaler is liable to a purchaser of the goods from a retailer upon either the theory of an implied warranty of quality or fitness for the purpose intended, or upon the theory that the wholesaler had sold

an article that ultimately proved dangerous to property when used for the purpose for which it was manufactured."

In this state, liability has been recognized only in the case of food, explosives and automobiles.

Since the commencement of this action, the Washington Supreme Court rendered a decision involving the manufacture and installation of a furnace, *Dobbin v. Pacific Coast Coal Co.*, 25 Wn.(2d) 190; 170 P.(2d) 642. The furnace did not operate properly and "smoked up" the house. The Court analyzed the *Bock* and *Baxter* cases, designating the *Bock* case primarily one of negligence rather than fraud and recognized the *Baxter* case as authority that fraud may be maintained without privity. In the *Dobbin* case, the trial court had first rendered a decision there could be no recovery because there was no privity and on reargument allowed recovery for fraud. The Supreme Court reversed the trial court and held there was no right of recovery, recognizing the correctness of the lower court's first declared opinion.

It is submitted that the rule set forth in *Thornton v. Dow*, 60 Wash. 622; 111 Pac. 899 (1910), is still law in the State of Washington, modified only by the adoption of the principle set forth by Judge Cardoza in the case of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382;

111 N. E. 1050. This exception was by Judge Cardoza specifically restricted to articles "such that it is reasonably certain to place life and limb in peril when negligently made."

The New York Court, which rendered this decision, restricted its application by another famous decision, written by the same eminent jurist, *Ultramares Corp. v. Touche*, 174 N. E. 441; 255 N. Y. 170; 74 A. L. R. 1139. In this case the Court denied recovery to a person advancing money relying upon a certified balance sheet prepared by accountants for a third person. It was admitted that the accountants had been guilty of negligence to their employer. The Court refused to extend the principle of negligence to such a situation, contending that the only remedy is one based on fraud and that that fraud did not exist.

"The suiters thrown out of court because they proved negligence, and nothing else, in an action for deceit, might have ridden to triumphant victory if they had proved the self-same facts, but had given the wrong another label."

The Washington decisions are supported by the weight of authority in American jurisprudence.

Windram Mfg. Co. v. Boston Blacking Co., 131 N. E. 454; 231 N. Y. 18 (cement);

Tompkins v. Quaker Oats Co., 239 Mass. 147; 131 N. E. 456 (chicken feed);

Marsh Wood Products Co. v. Babcock & Wilcox,
240 N. W. 393; 207 Wis. 209;

Kramer v. Mills Lumber Co., 24 F.(2d) 313
(U. S. C. A. 8) (lumber);

Shipp v. Davis, 25 Ala. App. 104; 141 So. 366;

Giberti v. James Barrett Mfg. Co., 266 Mass.
70; 165 N. E. 19 (hot water tank);

Sherwood v. Lax & Abowitz, 259 N. Y. S. 948;
145 Misc. 578, Aff. 262 N. Y. S. 909, 238 App.
Div. 799 (holding shoes are not dangerous
instrumentalities);

Flies v. Fox Bros. Buick Co., 196 Wis. 196; 218
N. W. 855; 60 A. L. R. 357;

Sperling v. Miller, 47 N. Y. S.(2d) 191 (car-
pet);

Borg Warner Corp. v. Heine, 128 F.(2d) 657
(U. S. C. A. 6) (applying California common
law);

Stevens v. Allis-Chalmers Mfg. Co., 151 Kan.
638; 100 P.(2d) 723.

APPELLANTS' TWO AUTHORITIES

Appellants admittedly depend on only two cases
cited by them as authority for their theory of liability.

Ebers v. General Chemical Co., 310 Mich. 261,
17 N. W.(2d) 176;

E. I. du Pont de Nemours & Co. v. Baridon, 73
F.(2d) 26 (C. C. A. 8).

There is language in both cases to the effect that the
exception applicable to instrumentalities dangerous to

life and limb applies to articles dangerous to property in those particular jurisdictions. Appellee admits some jurisdictions have seen fit to extend the doctrine. Washington has specifically limited the rule to articles involving human peril, although it does permit recovery of damages to property.

Mazetti v. Armour & Co., 75 Wash. 622; 135 Pac. 633.

This is logical because a duty is established in such instances. No duty exists in this state where human peril is lacking.

Both the *Ebers* and the *Du Pont* cases could be justified in their jurisdictions on the theory of fraud. In both, representations of fact had been made and relied upon. Both cases involve suits against the manufacturer of the material. In the *Du Pont* case, a bulb grower had used a powder designated as "Semesan," purchasing it from a third party. The plaintiff claimed his bulblets had been ruined. Judgment for the plaintiff, however, was reversed and the case remanded for a new trial because the Court considered that the jury should pass upon the question whether or not the manufacturer's directions had been followed by the plaintiff and had not been correctly instructed in the matter. In discussing the theory of negligence, the Court cites numerous decisions with reference to the general rule and

its exceptions, including *Baxter v. Ford Motor*, 168 Wash. 456; 12 P.(2d) 409, and *Foster v. Ford Motor*, 139 Wash. 341; 246 Pac. 945. None of the authorities referred to involve an instrumentality dangerous only to property. For authority that the rule should be so extended, the Court cites in particular two California, one South Dakota and one Minnesota cases, to-wit:

Kolberg v. Sherwin-Williams Co., 93 Cal. App. 609; 269 Pac. 975;

White v. Natl. Bank of Commerce, 99 Cal. App. 519; 278 Pac. 915;

Murphy v. Sioux Falls Serum Co., 44 S. D. 421; 184 N. W. 252;

Ellis, et al, v. Lindmark, et al, 177 Minn. 390; 225 N. W. 395.

In the *Minnesota* case, a wholesaler had mislabeled linseed oil as cod liver oil and plaintiff's chickens were poisoned. This clearly falls within the *Mazetti* rule of an article involving human peril with property damage.

Murphy v. Sioux Falls Serum Co., supra, involved a hog cholera serum.

The two California cases were decided as a question of fraud. The *Du Pont* decision recognizes that with reference to the case of *White v. National Bank of Commerce*, supra.

In *Kolberg v. Sherwin-Williams*, there was a definite

misrepresentation of fact concerning the spray used on the orange trees and in particular statements that it had been used on other groves successfully. The evidence showed it was utterly unfit for a spray and that the company had had notice of considerable damage from the use of it.

We have observed that the Sixth Circuit Court in *Borg Warner Corp. v. Heine*, 128 F.(2d) 657, found the common law of California to be the same as the Washington rule.

Kalash v. L. A. Ladder Co., 34 P.(2d) 481; 1 Cal.(2d) 229;

Cliff v. Cal. Spray Chem. Co., 257 Pac. 99; 83 Cal. 424.

The case of *Ebers v. General Chem. Co.*, 310 Mich. 261; 17 N. W.(2d) 176, clearly involved fraud. The company had notice of damage to the trees at the time the plaintiff purchased the spray. It clearly comes within the rule of the *Kolberg* case and liability, unquestionably, would be recognized in our jurisdiction under authority of the fraud cases.

ASSUMING A DUTY, THERE IS NO NEGLIGENCE

Assuming a duty on the part of appellee corporation to the appellants, still there is no evidence of negligence. Appellants argue that the appellee corporation is liable

because Dr. Regan recommended the use of Elgetol 30 for a mildew control spray before having tested it in the valley for a period of three to five years. It is disputed between the parties as to whether Dr. Regan ever "recommended," or merely "suggested" the use of the material. It is admitted that he made no claims with reference to the qualities of the product except that it had been used as a commercial thinner without injury and during the course of such use was found effective to control mildew. It is admitted that the standard treatment for mildew control is to spray in the "pink" and "calyx" (R. 92, 100, 109, 115, 143, 186) and that it is necessary to effect thinning by commercial agents to spray in full bloom or early calyx (R. 91, 101, 134).

If the statements made by Dr. Regan are in the category of recommendations, such statements cannot be the basis of a suit in negligence any more than for breach of warranty in an ordinary sales transaction. It has been held that recommendations by a druggist or merchant of a particular drug or cosmetic does not of itself create a duty to foresee the results.

Ray v. Burbank & Jones, 61 Ga. 505; 34 Am. Rep. 103;

Bell v. Adler, 11 S. E.(2d) 495; 63 Ga. A. 473.

In the *Ray* case, a druggist recommended a drug to use on an injured horse, stating it had been used by

others successfully. In the *Bell* case, a saleslady said the store highly recommended a cold cream and that it was wonderful and would do no harm to the skin. Liability was denied in both cases.

In *Young v. Parke Davis & Co.*, 49 Pa. Super. 29, a manufacturing chemist was held not liable for injurious application of a drug, even though reference was made in its catalog to statements by another surgeon that he had made the same kind of use of the product with success.

Appellants, Emerson and Stahler (and Stahler is the one responsible for the use of the spray material in the Keck-Stahler orchard) admit they knew that Elgetol 30 was in the experimental stage when they used it (R. 71-72, 81, 137-139).

This fact alone would necessitate the direction by the Court that they had assumed the risk of its use.

McGee v. Bennett, 72 Ga. A. 271; 33 S. E. (2d) 577;

Hollingsworth v. Midwest Serum Co., 183 Iowa 280; 162 N. W. 620.

In the *Hollingsworth* case, the Court said:

“It is greatly to the interest of the public that effort and experimentation go on. A great degree of success has been attained. Continual discovery is being made. Even though remedies have only

partial success, they are well worthwhile . . . Both purchaser and seller knew in the use of the article uncertainty of result to some degree was inevitable. It was the duty of the producer to follow the approved methods of production and of testing as generally recognized by those versed in the subject. Under the undisputed testimony he could do no more for general use. If further testing were deemed desirable for added security as to a particular herd, the purchaser had the opportunity to make it upon a few of the particular herd which he was about to inoculate. Before inoculating a herd of 210 pigs, as was done in one case, it might have been more prudent to have first selected 8 pigs and experimented thereon."

In the *McGee* case, the Court held it was proper to introduce pamphlets showing the fungicide involved was in an experimental stage and that the plaintiff was aware of it. Furthermore, the Court specifically upheld an instruction which directed the jury to find for the defendant if they found the damage was caused by weather conditions or method of planting or any reason over which the defendant had no control and if "plaintiff had knowledge that the use of the product was in the experimental stage."

RISK ASSUMED

It is elementary that in the law of sales a warranty will not extend to open visible or known facts concerning the merchandise.

By the same legal logic, appellants must be held to have assumed the risk or be guilty of contributory negligence.

Mr. Stahler testified (R. 137-139):

“Q. You did at that time know that Elgetol was in the experimental stage, so far as using it for mildew control was concerned, didn't you?

A. I knew it was new in the valley.

Q. Pardon me?

A. Yes, I knew it was new in the valley, yes, sir.

Q. And you knew that it had been used as a thinner and had in those cases cleaned up the mildew?

A. That's what I had heard.

Q. Nobody had ever told you that it had been used in the pink and calyx before?

A. No.

Q. You assumed that using the Elgetol as you did on the varieties you mentioned was experimental so far as using Elgetol was concerned, didn't you, Mr. Stahler?

A. Well, no; not in my case. I didn't suppose it was experimental.

Q. I mean—not in what case, did you say?

A. I didn't suppose I was experimenting with it when I did it, no.

Q. Well, you remember when I took your deposition March 9, 1946, in Mr. Hawkins' office?

A. Yes, sir.

Q. Before a court reporter. I find these questions

and answers on page 16 of the transcript. I guess I'll have to get a start here: (Reads from page 15)

'Question: Did he (referring to Dr. Reagan) ever tell you that Elgetol 30 had been used solely for mildew control?

Answer: No.

Question: He told you, I believe, that they had hoped it would work out, because it had got results on mildew when they used it as a thinner, is that right?

Answer: Yes, sir.'

Q. That's correct so far?

A. That's correct.

'Question: You understand that it was in the experimental stage insofar as using it for mildew alone was concerned?

Answer: Well, he claimed it had been used for mildew before, but I never saw it.

Question: You mean it had been used as a thinner?

Answer: As a thinner, yes, and had cleaned up the mildew.

Question: But so far as using it in the pink and calyx, for the purpose of mildew only, you knew that was experimental?

Answer: Well, I suppose it was.

Question: You assumed it was at that time, I take it?

Answer: Yes.'

Q. You remember those questions and answers?

A. Yes, I remember those.

Q. And they are correct?

A. I guess they are."

And later, referring to Dr. Regan, Mr. Stahler said (R. 145):

"He just thought it would control it in 1945, if it controlled mildew as a thinner; he thought it would work as a regular mildew spray."

Mr. Emerson testified: (R. 71-72)

"Q. Did you ever talk with or know any individual grower or growers that used Elgetol before you used it, in 1945?

A. Had I talked with? * * *

Q. Yes, did you know of any growers that used it, besides yourself, before you started using it in '45?

A. I knew of some that had used it similar to what I had used it, late in the season.

Q. That is, they had used it in 1944?

A. That's right.

Q. And from what you could learn from these growers, did they get good results in 1944?

A. Some got some burn; that they were not really well pleased with the use of it.

Q. I'm not sure I understand—and they were not pleased?

A. Some were not well pleased with the use of it, and some were.

Q. And the ones that were not well pleased with the use of it, was because they had some burns, is that right?

A. That was the complaint they made to me.

Q. And you knew that before you used it at all in 1945, didn't you?

A. Yes."

And again (R. 81) :

"Q. Now, Mr. Emerson, isn't it a fact that Dr. Regan told you that Elgetol 30 had been used for the purpose of thinning?

A. Yes."

The appellants knew the product was new in Yakima Valley so far as mildew agent was concerned and that the only testing the product had in that locality was with particular orchardists the previous year.

DAMAGE NOT FORESEEABLE

Dr. Regan and those connected with the appellee corporation, as reasonable individuals, had no reason to foresee Elgetol 30 might cause injury when used as a mildew control in the spring of 1945. The experts called by the appellants, Mr. Luce and Mr. Reeves, admitted the damage could not be anticipated.

Mr. Luce, Extension Agent in Horticulture for the county and State College (R. 106), admitted that he had testified at a prior trial involving the same use of this chemical as follows: (R. 118)

"Question: Mr. Luce, from what you know of

Elgetol 30 and its history in the Yakima Valley, I will ask you whether or not Dr. Regan and other agents of the defendant here, the California Spray-Chemical Corporation, should have reasonably anticipated any serious injury from the use of this product, Elgetol 30?

“Answer: Not to my knowledge; that was not the history of the use of Elgetol up to that period.”

There is no expert testimony as how the injury was effected by the use of Elgetol. The evidence is that Elgetol 30 was used and damage resulted. There is an assumption by several witnesses that weather was a factor and that the rain following the spray in calyx time may have caused the damage. Mr. Luce gave as his opinion that the damage was caused by either improper application or unseasonable rains (R. 114-115). There is positive evidence that the weather was unusually wet (R. 140, 144, 335, 377). Mr. Liniger, a grower, who testified he had success in the use of the spray in 1945 said, however, that he did have some injury “to the west end of the orchard which was followed by rain.” He sprayed in the calyx and had no injury except to this portion of the orchard where the rain followed the spraying (R. 335).

It is estimated that appellee corporation had no reason to anticipate the unseasonable rains, if they were a factor, and there seems to be no other explanation by expert testimony, or otherwise, as to why the orchards were injured.

Moreover, in view of the fact that numerous growers did use the spray, both in the "pink" and "calyx," without injury in 1945 (R. 313, 318, 334, 343), it is submitted that it is conjectural to say the least, to place the blame on appellee.

Where testimony leaves the matter uncertain as to half a dozen causes of injury, the issue cannot be presented to the jury.

Patton v. Texas P. & R., 179 U. S. 658; 45 L. ed. 361.

Had defendants been able to carry out tests prior to 1945, there is nothing to indicate in the evidence that they would have discovered any harmful effects from its use. In 1945 many growers used the product with success and they express their determination to continue to use it in the future. Witness the experience of growers who testified in this case such as Cecil C. Clark (R. 296), Edward Ketcham (R. 305), D. W. Brackett (R. 320), A. J. Beckwith (R. 341), Lawrence Liniger (R. 331), David H. Shuman (R. 316). All these witnesses used it in 1945 and some in 1946 with no ill effects. Mr. Clark used it as a thinner in 1944 (R. 299) and in 1945 and 1946 for the dual purpose of thinning and mildew control (R. 302). Mr. Ketcham used the product with good results for mildew control and no injury in the calyx and first cover spray in 1945 which

follows almost immediately after the calyx (R. 313). He also used it in 1946 (R. 314). Mr. Shuman used it as a thinner in 1944 and again in 1945, applying it both times in the early calyx period (R. 319). Mr. Brackett sprayed in full bloom with no injury and found the product effective not only for the purpose of thinning and mildew control but to get his trees out of biennial bearing in 1944 and 1945 (R. 323, 324). Mr. Liniger experimented with it in 1944 for thinning, found it effective for mildew and used it again at calyx time in 1945 with no injury except to those trees where the rain followed immediately after spraying (R. 335). Mr. Beckwith used it late in 1944 and in 1945 and 1946 at calyx time with good results and no commercial damage (R. 343).

**NO EVIDENCE DR. REGAN DID NOT EXERCISE THE
DEGREE OF SKILL AND DILIGENCE REQUIRED
OF MEN OF HIS PROFESSION**

The manufacture and use of agricultural sprays involves scientific skill and knowledge and negligence in advocating their use must be determined by testimony of experts.

Hill v. Gr. Northern Life Ins. Co., 186 Wash. 167; 57 P.(2d) 405;

Jordan v. Skinner, 187 Wash. 617; 60 P.(2d) 697;

Thomas v. Inland Motor Freight, 190 Wash. 428; 68 P.(2d) 603.

In this case we have no expert testimony that Dr. Regan did not exercise that degree of skill and care that would be required of him as a reasonably capable and careful entomologist. Appellants, after considerable questioning, elicited statements from their two experts, Mr. Luce and Mr. Reeves, that in their opinion it would take two to five years to determine conclusively the characteristics of any spray material (R. 90, 110). Mr. Luce prefaced his answer to the question propounded that he could not answer it so it would be of any value (R. 109-110). This is a long way from saying that an entomologist, knowing the emergent situation in the particular community, is negligent in giving information he has pertaining to a particular use of a particular spray, when to his knowledge it had shown no injury but good results and he honestly believed it was harmless (R. 145, 233).

Mr. Luce collaborated with other experts in an article published in a local newspaper recommending the spray be used in the calyx period for mildew control (R. 111, Exhibits 1 and 2, printed in this appendix).

Mr. Reeves published his findings that the product showed effective control of mildew (R. 93).

If experts such as these could not anticipate any in-

jury, certainly it is unreasonable to say that Dr. Regan is negligent for not doing so. It is not negligence to fail to guard against a bare possibility of injury.

“Precaution is a duty only so far as there is reason for apprehension.” *Smith v. Boston & M. R. R.*, 87 N. H. 246, 177 Atl. 729.

To be free from negligence, a man is not legally bound to safeguard against occurrences that cannot reasonably be expected or contemplated.

Hanson v. Washington Water Power Co., 165 Wash. 497, 5 P.(2d) 1025.

It is not negligence of a man of science to make a mistake if he has brought to bear a reasonable degree of skill and care.

Howatt v. Cartwright, 128 Wash. 343; 222 Pac. 496;

Jordan v. Skinner, 187 Wash. 617; 60 P.(2d) 697;

Smith v. Beard, 56 Wyo. 375; 110 P.(2d) 260.

The rule is well expressed in an old admiralty case, *The Tom Lysle*, 48 Fed. 690 (D. C. W. D. Penn.):

“The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances connected with the duty he is about to perform and, bringing to bear all his professed experience and skill, weighs those

facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes, then a failure, if caused thereby, would be negligence. 'No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called a mistake, but not carelessness.' *Brown v. French*, 104 Pa. St. 604; *Williams v. Le Bar*, 141 Pa. St. 149, 21 Atl. Rep. 525."

CONCLUSION

The common law in the State of Washington restricts actions of negligence against a manufacturer or distributor by persons other than the immediate vendee to cases only involving an instrumentality dangerous to life or limb. If the rule were otherwise the trial court's ruling in dismissing these cases was proper for the reason that there is no evidence from which negligence of the appellee can be inferred.

Measured by the same standard of care exercised by the appellants' experts, the conduct of the appellee corporation was proper. To hold otherwise would be to say that the local growers were not entitled to the benefit of the information the appellee corporation had,

even though it gave them its exact source of that information. The appellants, having no action in fraud or deceit, have no grounds for recovery.

It is respectfully submitted that the judgment of the trial court should be affirmed.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN
W. R. McKELVY,

Attorneys for Appellee

APPENDIX

(An article appearing in *Yakima Morning Herald*,
a daily newspaper, on May 6, 1945)

Fruit Spray Information

Prepared by the county extension service in co-operation with the U. S. Bureau of Entomology and Plant Quarantine and the State Department of Agriculture.

The warm weather recently has hastened the time when the calyx spray will be applied and also has produced the first codling moths in the bait traps this season. First moths were caught by the bureau of entomology and plant quarantine on the night of May 1. This compares with first catches on the night of April 28, last year. The season does not seem to be much different than last year according to apple bloom in the later districts.

Some growers may now be ready to start their calyx spray in the lower valley. At least 75 per cent of the petals should be off the trees and all indication of bee activity have ceased. All hives should have been removed from the orchard prior to starting the calyx spray. It is often best to start spraying the early varieties first as the calyx lobes will undoubtedly close on these varieties first.

Mention was made last week that spraying of pears should not be hurried and that all apple bloom in the immediate area should be well off and bee activity ceased. We feel that this information should still be stressed. Moth activity would indicate that the delay should not be beyond the point, however, when the calyx spray is applied to apples as there have already been a few nights of favorable temperatures for codling moth activity.

Some growers have inquired about applying lime

sulphur to Jonathans on the calyx when a "pink" spray has been missed. We cannot advise this as the control will probably be very poor. We suggest a possible substitute based on results obtained last year from the use of Elgetol as a blossom spray.

This spray when applied during the late blossom period gave good control of mildew. Therefore where the sulphur has been omitted in the "pink" it might be best to consider Elgetol for mildew control at calyx time. This material, we are advised by the manufacturer, can be applied in combination with the lead arsenate. This Elgetol is not the material used in the trunk spray formula. For recommended strength consult the representative.

This article was admitted in evidence as Defendant's Exhibit No. 1 (R. 113).

The following extract from Vol. 17, No. 2, *Ortho News*, April 17, 1945, was admitted in evidence as Plaintiffs' Exhibit B (R. 27):

Mildew Control

Mildew has been severe during the past several years on Jonathans and some other varieties of apples, with some cases of severe injury to D'Anjou and Bartlett pears and to some varieties of peaches. Growers have the choice of the standard treatment with liquid Lime-Sulfur (2 gallons or more in 100) in the "pink," with follow-up sprays of Wettable Sulfur for calyx or later sprays, if necessary.

To some, Sulfur would be objectionable because it delays the use of Summer Oil in the spray schedule. The grower also has a choice of Elgetol which has shown good control of Mildew and can be followed by

Summer Oil in the usual ten-day interval. Suggested dosage—(1) Elgetol $1\frac{1}{2}$ pints in 100 gallons of water in the “pink,” when buds are separated in the clusters and before the bloom opens, and (2) Elgetol $\frac{1}{2}$ pint in 100 with 3 pounds of Lead Arsenate in the calyx spray. Note. Be sure the Elgetol is stirred thoroughly in its container before removing the proper dosage. Careful, thorough spraying, with special attention to infected tip growth is essential for Mildew control.

In general, properly timed Mildew control sprays, with high wetting should aid in controlling the bud mite. Ortho Liquid Spreader, $\frac{1}{6}$ to $\frac{1}{4}$ pint in 100, gives effective wetting with either Lime-Sulfur or Elgetol.

The following excerpt from Vol. 17, No. 3, *Ortho News*, May 9, 1945, was admitted in evidence as Plaintiffs' Exhibit C (R. 28) :

Mildew Control Serious Problem

Judging from the number of growers who have asked for advise on the control of Mildew, this disease offers one of the most serious problems confronting orchardists at the present time. Jonathan, Rome, Newtown, Transparent, Gravenstein, and even Winesap apples in some instances, have presented this knotty problem. Bartlett and D'Anjou pears also, in some locations, have yielded a toll to this disease.

The use of Elegtol for the control of Mildew has shown increasing popularity among fruit growers during the last two years. In the first place, growers who have used Elgetol have in most instances been well satisfied with results in checking this disease. At the same time it permits a follow-up of a Summer Oil combination in the usual spread between sprays, which would not be possible where Sulfur has been used. It should be noted, nevertheless, that Elgetol is not a

producer of miracles. Its use, for effective results, requires absolute thoroughness, timely applications and at proper dosage, preferably with a neutral wetting agent, Ortho Liquid Spreader, as outlined in *Ortho News*, No. 2 of this year. Also it is not to be presumed that in the use of a product relatively new under Northwest orchard conditions, all of the "angles" of its peculiarities are fully known.

Mildew Not Susceptible to Single Application Control

In order to protect both fruit and foliage from Mildew infection, an early application in the "pink," after the fruit buds have separated in the clusters and before the bloom opens, is essential. Since some of the leaf buds are not entirely open at the time of the "pink" spray, a follow-up application in the Calyx spray, in combination with Lead Arsenate and Ortho Liquid Spreader—but no Summer Oil—has been suggested. Some cases came to our notice last summer, however, where a single application of Elgetol, at 1 pint dosage in 100, alone or in combination with Lead Arsenate, gave excellent control of Mildew. However, at this late period of infection, the Mildew had already marked the fruit and had severely injured the tip growth.

Other Benefits Possible With ELGETOL

(1) Mite Control—Since some of the apple varieties, severely attacked by Mildew, are often infested by the Bud Mite, there is good reason to believe that the Elgetol treatment will be very effective against this mite, or against any other kinds of mites present on foliage or bark at the time of application.

(2) Tree Stimulation—Quite a number of orchardists have referred to the improved growth on their fruit trees after an Elgetol treatment. In view of the chemical composition of this product, such an effect might be possible, aside from the benefit which would naturally follow after the Mildew had been checked.

(3) Bloom Thinning—While many growers have reported good results with Elgetol for “chemical thinning” at bloom time, there are so many variables which might affect results that growers should be well informed of possible hazards before attempting this practice. It is better to err on the safe side of “some thinning” than to overdo the job.

No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING
FISHER, DAVE GARCIA, EARL GRAHAM,
IRA C. HOLER, LOUIS KANIER, EMRY KEY,
RICHARD MAGNUS, LEON T. McGROSSEN,
GEORGE W. PETERSON, THOMAS P. RE-
MUS, JOE P. SEVEDRA, SIDNEY H. SMITH,
LOUIE VAUGHN, NOBLE F. WHITE, HAR-
OLD N. WHEELER and MORRIS WOLF,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED
SEP - 11 1947
PAUL P. O'BRIEN,
CLERK.

No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING
FISHER, DAVE GARCIA, EARL GRAHAM,
IRA C. HÖLER, LOUIS KANIER, EMRY KEY,
RICHARD MAGNUS, LEON T. McGROSSEN,
GEORGE W. PETERSON, THOMAS P. RE-
MUS, JOE P. SEVEDRA, SIDNEY H. SMITH,
LOUIE VAUGHN, NOBLE F. WHITE, HAR-
OLD N. WHEELER and MORRIS WOLF,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer, Amended	7
Appeal:	
Notice of	32
Notice re Points on (Circuit Court).....	291
Order Extending Time to Docket.....	33
Statement of Points on.....	33
Certificate of Clerk.....	39
Complaint, Amended	2
Findings of Fact and Conclusions of Law.....	12
Schedule A—Actual Overtime Rate.....	23
Judgment	27
Minute Order Entered December 31, 1946.....	32
Motion for New Trial.....	29
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	32
Notice re Points on Appeal (Circuit Court).....	291
Order Extending Time to Docket Appeal.....	33
Order re Exhibits.....	38

ii.

Reporter's Transcript of Proceedings.....	40
Defendant's Exhibits (See Index to Exhibits)	
Testimony on Behalf of Plaintiffs:	
Armstrong, Bert—	
Direct examination	78
Cross-examination	79
Charette, Albert—	
Direct examination	236
Cross-examination	237
Farmer, Ernest R.—	
Direct examination	72
Cross-examination	77
Fisher, King—	
Direct examination	267
Cross-examination	268
Garcia, David—	
Direct examination	218
Cross-examination	220
Graham, Earl—	
Direct examination	175
Holder, R. C. —	
Direct examination	211
Cross-examination	213
Jamison, Estel C.—	
Direct examination	43
Cross-examination	46
Kanir, Louis—	
Direct examination	179
Cross-examination	180

iii.

Reporter's Transcript of Proceedings:	Page
Testimony on Behalf of Plaintiffs:	
Key, Emory—	
Direct examination	83
Cross-examination	87
Magnus, Richard—	
Direct examination	226
Cross-examination	227
Redirect examination	234
Recross-examination	235
McCrossen, Leon Thomas—	
Direct examination	203
Cross-examination	205
Peterson, George W.—	
Direct examination	189
Cross-examination	190
Redirect examination	194
Recross-examination	196
Remus, Thomas P.—	
Direct examination	182
Retzer, Henry C.—	
Direct examination	49
Cross-examination	59
Redirect examination	72
Savedra, Joseph—	
Direct examination	185
Cross-examination	187
Smith, Sidney A.—	
Direct examination	269
Cross-examination	271
Vaughn, Louie—	
Direct examination	198
Cross-examination	200

iv.

Reporter's Transcript of Proceedings:	Page
Testimony on Behalf of Plaintiffs:	
Wheeler, Earl Nelson—	
Direct examination	223
Cross-examination	224
White, Noble F.—	
Direct examination	215
Cross-examination	217
Wolf, Morris—	
Direct examination	221
Cross-examination	222
Testimony on Behalf of Defendant:	
Brammer, Twyman R.—	
Direct examination	127
Cummins, James—	
Direct examination	114
Direct examination (recalled).....	167
Redirect examination	170
Direct examination (recalled).....	241
Voir Dire examination.....	246
Direct examination (resumed).....	254
Cross-examination	261
Redirect examination	265
Diegel, Maynard—	
Direct examination	136
Cross-examination	152
Direct examination (recalled).....	238
Direct examination (recalled).....	273
Stipulation Concerning Exhibit K (Circuit Court).....	292
Statement of Points on Appeal.....	33
Stipulation re Exhibits.....	37

INDEX TO EXHIBITS

Page

Defendant's Exhibits:

A-1. Waybill No. LA. 4485 (For Identification)....	104
A-2. Waybill No. LA. 5493 (For Identification)....	104
A-3. Waybill No. LA. 5574 (For Identification)....	106
A-4. Waybill No. LA. 5099 (For Identification)....	109
A-5. Waybill No. LA. 4383 (For Identification)....	111
A-6. Waybill No. LA. 5606 (For Identification)....	111
A-7. Waybill No. LA. 5540 (For Identification)....	113
B. Navy regulation manual (For Identification)..	135
C. Summary of Mr. Diegel (In Evidence).....	140
D. Three worksheets (For Identification).....	156
(In Evidence)	174
E. Navy contract awarded in May, 1945 (In Evidence)	167
F. One sheet of the 1944 contract (For Identification)	170
G. Contract No. N-244 s-31163 for a period running from July 1, 1942 to June 30, 1943 (In Evidence)	239
H. Contract for a period running from July 1, 1943 to June 30, 1944 (In Evidence).....	239
I. Contract dated June 1, 1944 (In Evidence).....	240
J. Photostatic copy of general conditions which are attached to each contract (In Evidence)..	240
K. Resume of the Periods of Employment of Certain Employees (In Evidence).....	253

Defendant's Exhibits:	Page
L. Copy of an Order, Motor Carriers 34278, dated September 19, 1938 (In Evidence).....	255
M. Permit to operate as a city carrier (In Evidence)	256
N. Permit to operate as a radial highway common carrier (In Evidence).....	256
O. Sheet from cartage book (For Identification)..	274
P. Report with supporting documents (For Identification)	284
Q. Report with supporting documents (For Identification)	286
R. Work sheet (In Evidence).....	287

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

JOHN W. PRESTON

PRENTISS MOORE

712 Rowan Building

458 South Spring Street

Los Angeles 13, Calif.

For Appellees:

CHARLES E. BEARDSLEY

HERBERT V. WALKER

601 Rowan Building

458 South Spring Street

Los Angeles 13, Calif. [1*]

In the United States District Court in and for the
Southern District of California
Central Division

Civil Action File No. 4690-OC

HARRY KENT, BERT ARMSTRONG, GEORGE L.
CALLARD, LEE CHAPEL, L. A. CHARETTE,
ED CUNNINGHAM, KING FISHER, MABLE
FURHITE, DAVE GARCIA, LESLIE HAM-
MOND, IRA C. HOLDEN, LOUIS KANIK,
EMERY KEYES, RICHARD MAGNUS, H. P.
McCORMACK, LEON McCRUDDEN, GEORGE
W. PETERSON, THOMAS P. REMUS, LOUIE
VAUGHN and MORRIS WOLF,

Plaintiffs added pursuant to Order of Court of March 4,
1946:

EMERY KELLY, JOSEPH BRICKER, HAROLD
N. WHEELER, SIDNEY H. SMITH, EARL
GRAHAM, JOE P. SAVEDRA,

Plaintiffs,

vs.

COAST VAN LINES, INCORPORATED, a California
corporation,

Defendant.

AMENDED COMPLAINT

(For Compensation Under Fair Labor Standards Act
of 1938, and for Accounting)

As Amended Pursuant to the Order of Court of
March 4, 1946

In accordance with the Order of Court made herein
on March 4, 1946, requiring the amending of the Com-

plaint to include all additional parties plaintiff, come now the plaintiffs above named and by this Amended Complaint complain of the defendant and for a cause of action allege: [2]

I.

That plaintiffs have since August 15, 1942, been employed by defendant for various periods of time and at various wage rates, and jointly and severally bring this action under and by virtue of the provisions of an Act of Congress entitled "Fair Labor Standards Act of 1938", and particularly Section 16(b) thereof, (Pub. No. 718, 75th Cong.; 52 Stat. 1060), adopted June 25, 1938, hereinafter referred to as "the Act", for compensation due them for hours during which plaintiffs were employed in excess of the minimum schedules established by said Act, and for unpaid overtime compensation, and for additional equal amounts of liquidated damages under the Act, and for attorneys' fees as provided in said Act.

II.

That defendant is now and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of California having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California, where it is duly authorized to conduct its business.

III.

Jurisdiction is conferred on this Court by Section 41(8) 28 U. S. C. A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without re-

gard to the citizenship of the parties or the sum or value in controversy, and by Section 16(b) of the Act.

IV.

That plaintiffs are informed and believe, and upon such information and belief allege, that continuously since August 15, 1942, defendant has been engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, [3] products, commodities and merchandise, the greater part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof; and that defendant knew or had reason to believe at all the times herein mentioned that such goods had already been or would be sold for commerce and were in the course of being shipped in commerce; that said goods and products were shipped, transported and otherwise disposed of among the several States and from the State of California to points outside thereof.

V.

That plaintiffs are informed and believe and upon such information and belief allege, that since August 15, 1942, and during all of the respective periods when each of them has been in the employ of defendant, they have been engaged and employed in handling and otherwise working on goods and in a business and at an occupation necessary to the transportation of goods in interstate commerce within the meaning of said Fair Labor Standards Act of 1938.

VI.

That on frequent occasions from August 15, 1942, to the date hereof plaintiffs were employed for certain hours in excess of the work week established by Section

7, Subdivision (2) of said Act, but that defendant failed to pay the compensation or overtime prescribed by the provisions of said section. That the number of hours and amount of compensation for such overtime for each plaintiff is a matter reported on the books and accounts kept and maintained by defendant, but plaintiffs have no accurate records of said hours and compensation claimed to be due, and accordingly an account should be rendered by defendant to fix and determine the amount of said claims. That there is due, owing and unpaid from defendant to plaintiffs and each of them such compensation for time [4] during which plaintiffs and each of them were employed in excess of the work week established by said Act in such amounts as shall be determined by said accounting.

VII.

That said Act provides that an employer who violates the provisions of Section 7 of said Act shall be liable to the employees affected, not only in the amount of their unpaid overtime compensation, but in an additional equal amount as liquidated damages, and that there is due, owing and unpaid by defendant to plaintiffs and each of them such additional equal amounts as liquidated damages as shall be found to be due to plaintiffs by said accounting.

VIII.

That said Act further provides that an action to recover such liability may be maintained by any one or more employees for and in behalf of himself, or themselves, and other employees similarly situated, and plaintiffs aver that this action was brought for and in behalf of the originally named plaintiffs and other employees similarly situated; that additional plaintiffs have now

been included herein, and the plaintiffs now named are all of those in whose behalf this action is to be maintained.

IX.

Further, said Act provides that the Court, in addition to any judgment awarded to plaintiffs, shall allow a reasonable attorneys' fee to be paid by the defendant, as well as costs of action, and plaintiffs aver that they have been required to employ attorneys Charles E. Beardsley and Herbert V. Walker to represent them and bring this action in order to establish such liability.

Wherefore, plaintiffs pray that defendant be required to account to plaintiffs, and each of them, for the total number of hours which each has been employed between August 15, 1942, and the date of this Complaint, in excess of the minimum work week prescribed [5] by said Act, and the amount of compensation that is required to be paid by said Act, and that upon such sums being computed a judgment be entered for plaintiffs and each of them and against defendant for such amount as the accounting shall show each plaintiff is entitled to receive, together with an equal additional amount as liquidated damages, and a reasonable sum for attorneys' fees and costs of suit incurred herein, and for all other relief which to the Court shall seem proper.

Dated: Mar. 15, 1946.

HERBERT V. WALKER and
CHARLES E. BEARDSLEY

By Herbert V. Walker

Attorneys for Plaintiffs [6]

[Verified]

[Affidavit of Service by Mail]

[Endorsed]: Filed Mar. 23, 1946. [7]

[Title of District Court and Cause]

AMENDED ANSWER

Comes now the defendant and answering the amended complaint on file herein, admits, denies and alleges as follows:

I.

Answering the allegations contained in paragraph IV, admits that this defendant has been continuously engaged in the business of packing, crating, storing, shipping, handling, and working on of goods, wares, products, commodities and merchandise. Other than herein admitted, denies generally and specifically each and every allegation contained in paragraph IV.

II.

Denies generally and specifically each and every allegation contained in paragraph V.

III.

Denies generally and specifically each and every allegation contained in paragraph VI. [8]

IV.

Answering the allegations contained in paragraph VII, this answering defendant admits that the Act provides for liquidated damages as alleged in said paragraph. Other than as herein admitted, however, denies each and every allegation contained in paragraph VII.

V.

Answering the allegations contained in paragraph IX, this answering defendant admits that the Act provides for attorneys' fees. Other than as herein admitted, however, denies each and every allegation contained therein.

For a Second, Further and Separate and Distinct Defense to Plaintiffs' First Amended Complaint on File Herein and in Defense of the Respective Claims of Each and Every Plaintiff Herein, Defendant Alleges:

I.

Defendant hereby repeats and incorporates herein by reference, the same as if herein again fully set forth, all statements and denials of paragraphs I to V inclusive, of his answer, as hereinabove alleged and stated; and, in addition thereto, defendant affirmatively alleges that this defendant, at all times mentioned in plaintiffs' said complaint was and is a service establishment; that at all times mentioned in plaintiffs' amended complaint, a greater part of defendants' servicing was and is in intra-state commerce; that at all times mentioned in plaintiffs' amended complaint, said plaintiffs when, as and if they were employed by defendant, were employed as employees of a service establishment and that they and each of them were, at all such times, engaged in a service establishment, the greater part of whose servicing was and is in intra-state commerce. [9]

II.

That, by reason of the facts hereinabove affirmatively alleged, the provisions of an Act of Congress entitled "The Fair Labor Standards Act of 1938" and, particularly, Section 16b thereof, (Pub. No. 718—75th Congress; 52 Statutes 1060) adopted June 25, 1938, or as amended at any time, has no application to this defendant

or to any of the plaintiffs herein but that this defendant and each of the plaintiffs herein is exempt from the application thereof under and by virtue of Section 213(a)(2), U. S. C. A.

For a Third, Further and Separate and Distinct Defense to Plaintiffs' First Amended Complaint on File Herein and in Defense of the Respective Claims of Each and Every Plaintiff Herein, Defendant Alleges:

I.

Defendant hereby repeats and incorporates herein by reference, the same as if herein again fully set forth, all statements and denials of paragraphs I to V inclusive, of his answer, as hereinabove alleged and stated; and, in addition thereto, defendant affirmatively alleges that this defendant, at all times mentioned in plaintiffs' said complaint was and is a retail establishment; that at all times mentioned in plaintiffs' amended complaint, a greater part of defendants' selling was and is in intra-state commerce; that at all times mentioned in plaintiffs' amended complaint, said plaintiffs when, as and if they were employed by defendant, were employed as employees of a retail establishment and that they and each of them were, at all such times, engaged in a retail establishment, the greater part of whose selling was and is in intra-state commerce.

That, by reason of the facts hereinabove affirmatively alleged, the provisions of an Act of Congress entitled

“The [10] Fair Labor Standards Act of 1938” and, particularly, Section 16b thereof, (Pub. No. 718—75th Congress; 52 Statutes 1060) adopted June 25, 1938, or as amended at any time, has no application to this defendant or to any of the plaintiffs herein but that this defendant and each of the plaintiffs herein is exempt from the application thereof under and by virtue of Section 213(a)(2), U. S. C. A.

For a Fourth, Further and Separate and Distinct Defense to Plaintiffs’ First Amended Complaint on File Herein and in Defense of the Respective Claims of Each and Every Plaintiff Herein, Defendant Alleges:

I.

Defendant hereby repeats and incorporates herein by reference, the same as if herein again fully set forth, all statements and denials of paragraphs I to V inclusive; of his answer, as hereinabove alleged and stated; and, in addition thereto, defendant alleges further that the said plaintiffs, and each of them, when, as and if they were employed by this defendant in the handling of and working on of goods in a business and at an occupation necessary to the transportation of goods in inter-state commerce, the plaintiffs and each of them were employed as drivers of motor vehicles, trucks, trailers, tractors and semi-trailers and similar transportation equipment and in the maintenance and servicing of such transportation equipment; that they were employed to load and unload such transportation equipment and to weigh, mark, pack

and crate the goods, wares and merchandise constituting the cargoes of such transportation equipment; that they, and each of them, at all times mentioned in their complaint devoted a substantial portion of their time to the safety of operations and equipment; and that they and each of them actually engaged, a substantial portion of their [11] time, in the driving, maintenance and servicing of the aforesaid transportation equipment and in the weighing, marking, packing and crating and loading of the cargoes of such transportation equipment; that, by reason of the facts as hereinabove alleged, the defendant and each of the plaintiffs hereinabove is exempt from the application of the provisions of an Act of Congress entitled "The Fair Labor Standards Act of 1938" and, particularly, Section 16b thereof, (Pub. No. 718—75th Congress; 52 Statutes 1060) adopted June 25, 1938, or as amended at any time.

Wherefore, this answering defendant prays plaintiffs take nothing by their amended complaint; for its costs incurred herein and for such other and further relief as this court may deem just and proper.

PRENTISS MOORE

Attorney for Defendant

Dated this 23rd day of October, 1946. [12]

[Verified]

[Endorsed]: Filed Oct. 23, 1946. [13]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial in the courtroom of and before Honorable J. F. T. O'Connor, Judge Presiding, plaintiffs Bert Armstrong, L. A. Charette, King Fisher, Noble F. White, named in the Amended Complaint as Mable Furhite, Dave Garcia, Ira C. Holder, named in the Amended Complaint as Ira C. Holden, Louis Kanir, named in the Amended Complaint as Louis Kanik, Emery Key, named in the Amended Complaint as Emery Keyes, Richard Magnus, Leon McCrossen, named in the Amended Complaint as Leon McCrudden, George W. Peterson, Thomas P. Remus, Louie Vaughn, Morris Wolf, Harold N. Wheeler, Sydney H. Smith, Earl Graham and Joe P. Savedra, all appearing in person and by their attorneys, Herbert V. Walker and Charles E. Beardsley, and defendant Coast Van Lines, Inc., a California corporation, appearing by its officers and Prentiss Moore, Esq., its attorney, and the trial of said cause having proceeded on October 23, October 24, October 28, October 29, and [14] November 4, 1946, and evidence both oral and documentary having been offered and received, and the cause having been argued and submitted to the court for decision on said November 4, 1946, and good cause therefore appearing, the court now makes its Findings of Fact and Conclusions of Law in writing as follows:

FINDINGS OF FACT

The Court finds the following facts from the evidence presented at said trial:

I.

That the plaintiffs hereinafter named in the schedule hereunto annexed, marked Schedule A, and by this reference incorporated in these Findings, have, since August 15, 1942, been employed by the defendant for the various periods of time and at the various wage rates which are respectively set after their names in said Schedule A; that said plaintiffs have jointly and severally brought this action under and by virtue of the provisions of an Act of Congress entitled "Fair Labor Standards Act of 1938" and particularly Section 16(b) thereof, Pub. No. 718, 75th Cong.; 52 Stat. 1060), adopted June 25, 1938, hereinafter referred to as "the Act", for compensation due them for hours during which said plaintiffs were employed in excess of the minimum schedules established by said Act, and for unpaid overtime compensation, and for additional equal amounts of liquidated damages under the Act, and for attorneys' fees as provided in said Act.

II.

That defendant Coast Van Lines; Incorporated, is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal office and place of business in the City of Los Angeles, County of Los Angeles, State of California, where it is duly authorized to conduct its business. [15]

III.

That jurisdiction is conferred on this Court by Section 41(8) 28 U. S. C. A. (Judicial Code) 24, giving the District Court original jurisdiction "of all suits and proceedings arising under any law regulating commerce", without regard to the citizenship of the parties or the sum or value in controversy, and by Section 16(b) of the Act.

IV.

That it is true that continuously since August 15, 1942, defendant has been engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, produces, commodities and merchandise, a considerable part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof; and that defendant knew or had reason to believe at all of the times herein mentioned that such goods had already been or would be prepared for commerce and were in the course of being shipped in commerce; and that it is true that said goods and products were shipped, transported, and otherwise disposed of among the several States and from the State of California to points outside thereof. The Court finds from the testimony of defendant that the proportion of goods handled by defendant during the periods at issue which moved in interstate commerce, and the proportion moving in intrastate commerce, are very nearly the same, and that there was not very much difference between the amount moving in interstate commerce and in intrastate commerce, and that for the purpose of these Findings the Court adopts the figures arrived at on an average taken from an analysis of the defendant's records presented in defendant's testimony,

which showed 55-1/3 per cent intrastate and 44-2/3 per cent interstate business.

V.

That it is true as to each of the plaintiffs named in [16] Schedule A hereunto annexed that since August 15, 1942, and during all of the respective periods when each of them has been in the employ of the defendant, each has been engaged and employed in handling and otherwise working on goods, and in a business and at an occupation necessary to the transportation of goods in interstate commerce within the meaning of the Fair Labor [JFT] a substantial Standards Act of 1938, during ~~the greater~~ portion of the time in each work week.

VI.

That it is true that on frequent occasions from August 15, 1942, to the date of said trial, certain of the plaintiffs named in said Schedule A were employed for certain hours in excess of the work week established by Section 7, Subdivision 2 of said Act, but that defendant failed to pay the compensation or overtime prescribed by the provisions of said section for those hours. That the number of hours and the amount of compensation for such overtime for each of said plaintiffs is a matter required to be reported on the books and accounts kept and maintained by defendant, but that plaintiffs have kept no accurate record of said hours or compensation claimed to be due, and that therefore defendant has been required to render an account to fix and determine the amounts of such overtime worked and the rates of pay in effect and applicable to each of said hours; that there

is due, owing and unpaid from defendant to said plaintiffs and each of them such compensation for time during which said plaintiffs and each of them were employed in excess of the work week established by said Act in the amounts which are specifically set forth, and for the hours, and at the rates of pay which are specifically set forth after the names of said plaintiffs, respectively, in Schedule A which is hereunto annexed.

VII.

That it is true that said Act provides that an employer who violates the provisions of Section 7 of said Act shall be liable [17] to the employees affected, not only in the amount of their unpaid overtime compensation, but in an additional equal amount as liquidated damages, and that there is due, owing and unpaid by defendant to plaintiffs and each of them, such additional equal amounts as liquidated damages as are found due to the respective plaintiffs named in said Schedule A which is hereunto annexed.

VIII.

That it is true that said act further provides that an action to recover such liability may be maintained by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, and plaintiffs have brought this action for the benefit of all of the plaintiffs named in the first Amended Complaint on file herein, but the same does not purport to bind or affect any plaintiffs or former employees not named in said amended complaint.

IX.

That it is true that said Act further provides that the Court, in addition to any judgment awarded to plaintiffs, shall allow a reasonable attorneys' fee to be paid by the defendant, as well as costs of action; that said plaintiffs for whom recovery is herein ordered, are not, nor is any of them, members of the Bar, and that they have been required to employ Attorneys Charles E. Beardsley and Herbert V. Walker to represent them and bring this action and try the same in order to establish the liability of defendant to said plaintiffs, and the court finds that the services of said attorneys in bringing the within action, and handling the same through the trial thereof in the District Court is the sum of \$1000.00, and said plaintiffs are entitled to judgment against the defendant, in addition to the amount of their overtime and the liquidated damages hereinabove referred to, for said sum as a reasonable attorneys' fee herein. [18]

X.

The Court finds that it is not true, as alleged in the Amended Answer of defendant Coast Van Lines, Incorporated, or at all, that defendant was or is a service establishment; that it is not true that at the times mentioned in plaintiffs' Amended Complaint the greater part of defendant's servicing was or is in intrastate commerce; that it is not true that at the times mentioned in plaintiff's complaint, said plaintiffs, when they were employed by defendant, were employed as employees of a service establishment or that they or each or any of them were or was at any of such times engaged in a service establishment, or an establishment the greater part of whose servicing was or is in intrastate commerce.

XI.

That it is not true, as alleged in said Amended Answer, or at all, that by reason of the facts therein alleged, or at all, the provisions of the Fair Labor Standards Act of 1938 have no application to the defendant or to any of the plaintiffs, and that it is not true that the defendant or each or any of the plaintiffs is exempt from the application of said Act under or by virtue of Section 13(a) of the Act, which is Section 213(a) (2), U. S. C. A., or otherwise, or at all. On the contrary, the Court finds that the provisions of said Act, and particularly Section 16(b) thereof, are applicable to all of the plaintiffs named in said Schedule A.

XII.

That it is not true, as alleged in said Amended Answer, or at all, that defendant was at any of the times mentioned in plaintiffs' Amended Complaint, or is, a retail establishment; that it is true, as in these Findings above alleged, that at the times mentioned in plaintiffs' Amended Complaint the intrastate shipments of defendant corporation averaged a larger proportion of its business than the interstate shipments; that it is not true that at the times mentioned in their Complaint, said plaintiffs named in Schedule A hereunto [19] annexed were, or any of them was, employed as employees of a retail establishment, the greater part of whose selling was and is in intrastate commerce, but on the contrary, the court finds
substantial [JFT]

that the ~~greater~~ portion of each of said plaintiffs' work and activities for all of the times referred to in plaintiffs' Amended Complaint, was devoted to interstate shipments and activities.

XIII.

That is not true, as alleged in said Amended Answer, or at all, that said plaintiffs, or any of them, when they were employed by the defendant in the handling of, and working on, of goods in a business and at an occupation necessary to the transportation of goods in interstate commerce, were employed as drivers of motor vehicles, trucks, trailers, tractors, semi-trailers, or other transportation equipment, or in the maintenance and servicing of such transportation equipment, or in the loading or unloading of such transportation equipment, or the weighing, marking, packing, crating of goods, wares, or merchandise constituting the cargoes of such transportation equipment in such a manner that either or any of them devoted a substantial portion of his time to the safety of operations and equipment; that it is not true that said plaintiffs or any of them actually engaged, a substantial portion of their time, in the driving, maintenance, or servicing of the aforesaid transportation equipment, or in the weighing, marking, packing, crating or loading of the cargoes of such transportation equipment in such manner as to be exempt from the application of the provisions of the Fair Labor Standards Act of 1938. That it is not true that either or any of said plaintiffs was so employed or engaged at any time during the period of his employment by defendant corporation as to come within the provisions of Section 13(b) of the Act, or so as to come within that class of employees as to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 [20] of the Motor Carrier Act of 1935, or the provisions of Part 1 of the Interstate Commerce Act, but that, on the contrary, said plaintiffs

did and do, and each of them did and does come within the provisions of Section 16(b) of the Fair Labor Standards Act of 1938 as amended.

XIV.

That it is true that each of the plaintiffs named in Schedule A hereunto annexed was, during the greater part, and during practically all of the time in each work week of his employment by defendant corporation, working on goods, wares and merchandise which were being handled by defendant under the provisions of a contract with the Navy Department of the United States of America, and that by far the greater part of defendant's business during said period was such Navy contract business. That such contracts were obtained by defendant in competitive bidding with other concerns engaged in the same or similar business and provided for the moving, packing, shipping, crating, and storing of Navy goods and goods and merchandise of Navy personnel.

XV.

That there is no evidence to prove that, and the Court finds it not to be true that plaintiffs Harry Kent, George L. Callard, Joseph Bricker, Lee Chapel, Ed Cunningham, Leslie Hammond, Clarence H. Jones, and H. P. McCormick are, or any of them is, entitled to recover, or has earned and failed to be paid, any overtime compensation as in the Amended Complaint herein alleged, or at all.

(Schedule A, as hereunto annexed, is by the references hereinabove contained made a part of these Findings of Fact.) [21]

CONCLUSIONS OF LAW

As Conclusions of Law from the foregoing Findings of Fact, the Court holds:

I.

That the plaintiffs Harry Kent, George L. Callard, Joseph Bricker, Lee Chapel, Ed Cunningham, Leslie Hammond, Clarence H. Jones and H. P. McCormick are not, nor is either or any of them, entitled to judgment herein, but that judgment should be entered herein that said plaintiffs take nothing by their complaint herein.

II.

That judgment should be made and entered herein in favor of the following plaintiffs and against the defendant in the following respective amounts for actual overtime unpaid and liquidated damages as provided for in the Act:

<u>Name</u>	<u>Actual Overtime</u>	<u>Liquidated Damages</u>	<u>Total</u>
Bert Armstrong	467.85	467.85	935.70
L. A. Charette	404.52	404.52	809.04
King Fisher	108.83	108.83	217.66
Dave Garcia	205.16	205.16	410.32
Earl Graham	161.02	161.02	322.04
Ira C. Holder	368.09	368.09	736.18
Louis Kanier	475.41	475.41	950.82
Emry Key	354.82	354.82	709.64
Richard Magnus	368.91	368.91	737.82

<u>Name</u>	<u>Actual Overtime</u>	<u>Liquidated Damages</u>	<u>Total</u>
Leon T. McCrossen	280.64	280.64	561.28
George W. Peterson	151.94	151.94	303.88
Thomas P. Remus	261.81	261.81	523.62
Joe P. Sevedra	152.00	152.00	304.00
Sidney H. Smith	333.72	333.72	667.44
Louie Vaughn	475.89	475.89	951.78
Noble F. White	202.19	202.19	404.38
Harold N. Wheeler	109.86	109.86	219.72
Morris Wolf	487.58	487.58	975.16
	<hr/>	<hr/>	<hr/>
Total	\$5,370.24	\$5,370.24	\$10,740.48

[22]

III.

That judgment should be made and entered herein in favor of all of the plaintiffs in Paragraph II above named, and against the defendant, for attorneys' fees for said plaintiffs' attorneys, Charles E. Beardsley and Herbert V. Walker, in the sum of \$ and for said plaintiffs' costs of suit herein.

Let judgment be entered herein accordingly.

Done in open court this 3 day of December, 1946.

J. F. T. O'CONNOR

U. S. District Judge [23]

SCHEDULE "A"
ACTUAL OVERTIME RATE

	<u>Weeks</u>	<u>Hrs. @ 5½ Per Wk.</u>	<u>Rate</u>	<u>Amount</u>
BERT ARMSTRONG				
8-22-42—12-31-42 (Gov. Reports)	19	104½ @ 1.00	50¢	\$ 52.25
4- 1-43—12-31-43 "	39	214½ @ 1.00	50¢	107.25
1- 1-44—12-31-44	52	286 @ 1.00	50¢	143.00
1- 1-45— 3-31-45	13	71½ @ 1.00	50¢	35.75
4- 1-45—12-31-45	37	203½ @ 1.02½	51¼¢	104.30
3- 2-46— 3-3-46	4	22 @ 1.15	57½¢	12.65
4- 1-46— 4-25-46	4	22 @ 1.15	57½¢	12.65
	168	924		467.85
L. A. CHARETTE				
6-43 —9-15-43	16	88 @ .95	47½¢	41.80
9-16-43—3-31-45	79	434½ @ 1.00	50¢	217.25
4- 1-45—3-31-46	46	252 @ 1.02½	51¼¢	129.66
4- 1-46—5-8-46	5	27½ @ 1.15	57½¢	15.81
	146	803		404.52
KING FISHER				
1- 5-44— 5-17-44	19	104½ @ .95	47½¢	49.64
7-31-45—12-19-45	21	115½ @ 1.02½	51¼¢	59.19
	40	220		108.83
DAVE GARCIA				
11-22-44—3-31-45	19	104½ @ 1.00	50¢	52.25
4- 1-45—3-31-46	52	286 @ 1.02½	51¼¢	146.58
4- 1-46—4-10-46	2	11 @ 1.15	57½¢	6.33
	73	401½		205.16

	<u>Weeks</u>	<u>Hrs. @ 5½ Per Wk.</u>	<u>Rate</u>	<u>Amount</u>
EARL GRAHAM				
8-22-42— 6-30-43	45	247½ @ .90	45¢	\$111.38
7- 1-43—11-43	19	104½ @ .95	47½¢	49.64
	64	352		161.02
IRA C. HOLDER				
9-1-43—10-30-43	8	44 @ .85	42½¢	18.70
11-1-43—10-15-44	47	258½ @ .95	47½¢	122.79
1-1-45— 3-31-45	13	71½ @ 1.00	50¢	35.75
4-1-45— 3-31-46	52	286 @ 1.02½	51¼¢	146.58
4-1-46— 7-10-46	14	77 @ 1.15	57½¢	44.28
	134	737		368.09
LOUIS KANIER				
9-15-42—2-28-43	24	132 @ .80	40¢	52.80
3- 1-43—6-30-44	70	385 @ .95	47½¢	182.88
7- 1-44—3-31 45	39	214½ @ 1.00	50¢	107.25
4- 1-45—3- 6-46	47	258½ @ 1.02½	51¼¢	132.48
	180	990		575.41
				[24]
EMRY KEYES				
1- 6-44—10-15-44	41	225½ @ .95	47½¢	107.11
10-15-44— 3-31-45	24	132 @ 1.00	50¢	66.00
4- 1-45— 3-23-46	51	280½ @ 1.02½	51¼¢	143.76
4-29-46— 7-17-46	12	66 @ 1.15	57½¢	37.95
	128	704		354.82

	<u>Weeks</u>	<u>Hrs. @ 5½ Per Wk.</u>	<u>Rate</u>	<u>Amount</u>
RICHARD MAGNUS				
6-43 — 9-15-43	16	88 @ .95	47½¢	\$ 41.80
9-15-43— 3-31-45	80	440 @ 1.00	50¢	220.00
4- 1-45—12-19-45	38	209 @ 1.02½	51¼¢	107.11
	134	737		368.91
LEON McCRUDDEN				
LEON T. McCROSSEN				
1-15-43—10-15-43	39	214½ @ .95	47½¢	101.89
10-15-43— 7-31-45	65	357½ @ 1.00	50¢	178.75
	104	572		280.64
GEORGE W. PETERSON				
4-19-43—12-31-43	37	203½ @ .95	47½¢	96.66
1- 1-44— 4-25-44	16	88 @ 1.00	50¢	44.00
10-15-45—11- 7-45	4	22 @ 1.02½	51¼¢	11.28
	57	313½		151.94
THOMAS P. REMUS				
7-7-44—3-31-45	35	192½ @ 1.00	50¢	96.25
4-1-45—3-31-46	52	286 @ 1.02½	51¼¢	146.58
4-1-46—5- 8-46	6	33 @ 1.15	57½¢	18.98
	93	511½		261.81
JOE P. SEVEDRA				
6-1-44—3-31-45	44	242 @ 1.00	50¢	121.00
4-1-45—6-15-45	11	60½ @ 1.02½	51¼¢	31.00
	55	302½		152.00
SIDNEY H. SMITH				
8-22-42—12-31-42	19	104½ @ .90	45¢	47.03
1- 1-43— 3-31-45	94	517 @ 1.00	50¢	258.50
4- 1-45— 6- 9-45	10	55 @ 1.02½	51¼¢	28.19
	123	676½		333.72

	<u>Weeks</u>	<u>Hrs. @ 5½ Per Wk.</u>	<u>Rate</u>	<u>Amount</u>
LOUIE VAUGHN				
8-22-42—12-31-42	19	104½ @ .90	45¢	\$ 47.03
1- 1-43— 3-31-45	117	643½ @ 1.00	50¢	321.75
4-45 —12-19-45	38	209 @ 1.02½	51¼¢	107.11
	174	957		475.89
NOBLE F. WHITE				
3-20-44—5-24-44	10	55 @ .90	45¢	24.75
5-24-45—3-46	45	247½ @ 1.02½	51¼¢	126.84
4- 1-46—7-17-46	16	88 @ 1.15	57½¢	50.60
	71	390½		202.19
				[25]
HAROLD N. WHEELER				
1-21-44—12-15-44	47	258½ @ .85	42½¢	109.86
MORRIS WOLF				
8-22-42— 6-30-43	43	236½ @ 1.00	50¢	118.25
7- 1-43— 2-22-45	86	473 @ 1.10	55¢	260.15
6-26-45—11- 7-45	14	77 @ 1.12½	56¼¢	43.31
11- 8-45— 3-31-46	20	110 @ 1.02½	51¼¢	56.38
4- 1-46— 4-17-46	3	16½ @ 1.15	57½¢	9.49
	166	913		487.58
				[26]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 3, 1946. [27]

United States District Court
Southern District of California
Central Division

No. 4690 O'C Civil

HARRY KENT, et al.

Plaintiffs,

vs.

COAST VAN LINES, INCORPORATED, a California
corporation,

Defendant.

JUDGMENT

Judgment is hereby entered in favor of the plaintiffs hereinafter named for the amounts set opposite the names of each, and judgment is further ordered in the sum of One Thousand Dollars (\$1000) in favor of Herbert V. Walker and Charles E. Beardsley, and against the defendant, Coast Van Lines, Incorporated.

Bert Armstrong	\$935.70
L. A. Charette	809.04
King Fisher	217.66
Dave Garcia	410.32
Earl Graham	322.04
Ira C. Holder	736.18
Louis Kanier	950.82
Emry Key	709.64
Richard Magnus	737.82
Leon T. McCrossen	561.28
George W. Peterson	303.88

Thomas P. Remus	523.62
Joe P. Sevedra	304.00
Sidney H. Smith	667.44
Louie Vaughn	951.78 [28]
Noble F. White	404.38
Harold N. Wheeler	219.72
Morris Wolf	975.16
	<hr/>
	\$10,740.48

And judgment is hereby ordered against Harry Kent, George L. Callard, Joseph Bricker, Lee Chapel, Ed Cunningham, Leslie Hammond, Clarence H. Jones, and H. P. McCormick, plaintiffs in this action, and in favor of the defendant.

And judgment is hereby ordered in favor of the plaintiffs for costs.

Costs taxed at \$49.00.

Dated December 3rd, 1946.

J. F. T. O'CONNOR
U. S. District Judge

Judgment entered Dec. 3, 1946. Docketed Dec. 4, 1946. Book COB 40, page 433. Edmund L. Smith, Clerk; by Francis E. Cross, Deputy.

[Endorsed]: Filed Dec. 3, 1946. [29]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

To Harry Kent, Bert Armstrong, George L. Gallard, Lee Chapel, L. A. Charette, Ed Cunningham, King Fisher, Mable Furhite, Dave Garcia, Leslie Hammon, Ira C. Holden, Louis Kanik, Emery Keyes, Richard Magnus, H. O. McCormack, Leon McCrudden, George W. Peterson, Thomas P. Remus, Louie Vaughn and Morris Wolf, Plaintiffs, and

To Herbert B. Walker and Charles E. Beardsley, Their Attorneys:

You and Each of You Will Please Take Notice that the [30] defendant intends to move the above entitled court to vacate and set aside the decision and judgment of the court rendered in the above entitled action, and to grant a new trial of said cause upon the following grounds affecting the substantial rights of said defendant, to-wit:

1. That the decision and judgment is contrary to the law in the case.
2. That the decision and judgment is contrary to evidence in the case.
3. That the decision and judgment is contrary to the law and evidence in the case.
4. That the court refused to admit proper evidence offered by the defendant.
5. That the decision and judgment is contrary to the evidence in the case, particularly in respect to the evidence adduced both by plaintiffs and the defendant, and uncon-

tradicted in any material aspect, that the defendant was at all times in the pleadings mentioned, a service establishment the greater part of whose servicing was in intra-state business.

6. That the decision and judgment is contrary to the law in the case, particularly with respect to Section 213 U. S. C. A. which provides in part that the provisions of Sections 206 and 207 of the Fair Labor Standards Act shall not apply with respect to any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intra-state commerce.

7. That the court committed prejudicial and reversible error in the trial of the above entitled cause in refusing to allow defendant to cross-examine plaintiffs and plaintiffs' witnesses with respect to the duties and activities of the plaintiffs, and particularly with respect to the amount of time devoted by the respective plaintiffs to activities affecting safety of operations, such as driving, repairing, maintaining, loading and checking motor vehicles engaged [31] in inter-state commerce, and as to the amount of time devoted to assisting or helping in any or all of the above activities affecting the safety of operation of motor vehicles engaged in inter-state commerce.

8. That the decision and judgment is contrary to the evidence in the case adduced by both plaintiffs and by the defendant and uncontradicted in any material respect, that certain plaintiffs, to-wit: Emery Keyes, Noble White, Louie Vaughn, Richard Magnus, Dave Garcia,

Ira C. Holden, George W. Peterson, Sidney Smith, King Fisher, Joe Sevedra and Harold N. Wheeler, devoted a substantial portion of their time to driving, repairing, maintaining and loading motor vehicles engaged in interstate commerce, or in helping or assisting in said activities.

9. That the decision and judgment is contrary to the law in the case, particularly with respect to the plaintiffs, Emery Keyes, Noble White, Louie Vaughn, Richard Magnus, Dave Garcia, Ira C. Holden, George W. Peterson, Sidney Smith, King Fisher, Joe Sevedra and Harold N. Wheeler, because Section 213 U. S. C. A. provides in part that the provisions of Sections 206 and 207 of the Fair Labor Standards Act shall not apply with respect to any employee to the extent that such employee is exempted by regulations or orders of the Administrator issued under Section 214 of the Fair Labor Standards Act.

Said motion will be made and based upon the records and files in the above entitled action and upon the Minutes of the court.

Dated this 13th day of December, 1946.

PRENTISS MOORE

Attorney for Defendant [32]

[Affidavit of Service by Mail]

[Endorsed]: Filed Dec. 13, 1946. [33]

[Minutes: Tuesday, December 31, 1946]

Present: The Honorable J. F. T. O'Connor, District Judge.

Good cause appearing therefor, it is by the Court ordered that the motion of defendant for a new trial, argued by counsel for defendant on December 30, 1946, be, and the same hereby is, denied. [34]

[Title of District Court and Cause]

NOTICE OF APPEAL

To Harry Kent, et al., Plaintiffs and Respondents, and
to Messrs. Walker and Beardsley, Their Attorneys:

Notice Is Hereby Given that Coast Van Lines, Inc., a corporation, defendant and appellant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on ruling denying motion for new trial on December 30, 1946.

Dated this 12th day of March, 1947.

PRENTISS MOORE

Attorney for Defendant and Appellant [35]

[Affidavit of Service by Mail]

[Endorsed]: Filed & mld. copy to Messrs. Walker and Beardsley, attys. for plfs., Mar. 14, 1947. [36]

[Title of District Court and Cause]

EXTENSION OF TIME FOR FILING AND
DOCKETING RECORD ON APPEAL

Good cause appearing therefor, It Is Hereby Ordered that defendant and appellant may have to and including the 22nd day of May, 1947, within which to docket its appeal and the record on appeal in the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of April, 1947.

C. E. BEAUMONT

Judge

[Endorsed]: Filed Apr. 22, 1947. [37]

[Title of District Court and Cause]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

Comes now the appellant in the above entitled cause and hereby states the points upon which it intends to rely on the appeal herein, as follows:

I.

That the District Court erred in holding that appellant was not, and is not, a service establishment within the meaning of Section 13 of the Fair Labor Standards Act of 1938 (52 Stat. 1067) providing that the wage and hour provisions of said Act shall not apply to any employee engaged in any service establishment the greater

part of whose servicing is in intrastate commerce. (29 U. S. C. A., Sec. 213(a)(2).)

II.

That the District Court erred in holding that at the times mentioned in the complaint herein the greater part of appellant's servicing was not, and is not, in intrastate commerce. [38]

III.

That the District Court erred in holding that appellees were not employed by appellant to render services in a service establishment and in holding that appellees did not render services in a service establishment the greater part of whose servicing was or is in intrastate commerce, within the meaning of Section 13 of the Fair Labor Standards Act of 1938. (29 U. S. C. A., Sec. 213(a)(2).)

IV.

That the District Court erred in holding that the wage and hour provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Secs. 206 and 207) apply to appellant under the facts of this case.

V.

That the District Court erred in holding that appellant was not, and is not, exempt from the application of the wage and hour provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A., Secs. 206 and 207) by reason of the exemption provisions of Section 13 of said Act. (29 U. S. C. A., Sec. 213(a)(2).)

VI.

That the District Court erred in holding that appellant violated the provisions of Section 16 of the Fair Labor

Standards Act of 1938 (29 U. S. C. A., Sec. 216) and in holding that by reason thereof appellant was, and is, liable to appellees for overtime wages or compensation, for liquidated damages in an equal amount, and for attorneys' fees for appellees' attorneys.

VII.

That the District Court erred in holding that the appellees, when employees of appellant and at the times mentioned in the complaint herein, did not devote a substantial portion of their time, respectively, to the performance of duties and work involving safety of operations of a private motor carrier in interstate commerce.

VIII.

That the District Court erred in holding that the appellees, [39] at the times mentioned in the complaint, were not engaged for a substantial portion of their time in performing the duties and work and at occupations necessary to the transportation of goods in interstate commerce, and in holding that appellees were not within the classes of employees as to whom the Interstate Commerce Commission has the power to establish qualifications and maximum hours of service pursuant to the provisions of the Motor Carrier Act of 1935. (49 U. S. C. A., Sec. 304.)

IX.

That the District Court erred in holding that appellant was not exempt from liability under the wage and hour

provisions of the Fair Labor Standards Act of 1938 by reason of Section 13(b)(1) thereof (29 U. S. C. A., Sec. 213(b)(1)), providing that the wage and hour provisions of said Act are not applicable to any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service as provided in 49 U. S. C. A., Sec. 304(a).

X.

That the District Court erred in giving judgment to the appellees, and each of them, in the amounts, respectively, specified in the judgment.

XI.

That the District Court erred in overruling appellant's motion for a new trial, and to vacate judgment and conclusions and to amend findings of fact.

Dated this 23rd day of April, 1947.

JOHN W. PRESTON and
PRENTISS MOORE

By John W. Preston

Attorneys for Defendant and Appellant [40]

Received copy of the within this 23 day of April, 1947.
Herbert V. Walker.

[Endorsed]: Filed Apr. 28, 1947. [41]

[Title of District Court and Cause]

STIPULATION RE EXHIBITS

It Is Hereby Stipulated by and between the respondents and appellant herein, acting through their respective counsel, that the above entitled Court may, if so advised, make its order herein that the original exhibits admitted in evidence in said action on the trial thereof, may be sent to the Appellate Court by the Clerk of this Court in lieu of copies thereof and that said Clerk be required to take such steps as seem advisable to him for the safekeeping, transportation and return of said exhibits.

Dated this 23rd day of April, 1947.

HERBERT V. WALKER and
CHARLES BEARDSLEY

By Herbert V. Walker
Attorneys for Plaintiff and Respondent

JOHN W. PRESTON and
PRENTISS MOORE

By John W. Preston
Attorneys for Defendant and Appellant

[Endorsed]: Filed May 6, 1947. [48]

[Title of District Court and Cause]

ORDER RE EXHIBITS

On stipulation of the parties hereto and good cause appearing therefor,

It Is Hereby Ordered that the original exhibits admitted in evidence on the trial of the above entitled action may, in lieu of copies thereof, be transmitted by the Clerk of this Court to the Circuit Court of Appeals, Ninth Circuit, and to that end said Clerk may take such steps for the safekeeping, transportation and return of said original exhibits as to him may be deemed proper.

Dated this 6 day of April, 1947.

J. F. T. O'CONNOR

Judge

[Endorsed]: Filed May 6, 1947. [49]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49 inclusive contain full, true and correct copies of Amended Complaint; Amended Answer; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Minute Order Entered December 31, 1946; Notice of Appeal; Order Extending Time for Filing and Docketing Record on Appeal; Statement of Points Upon Which Appellant Intends to Rely; Appellant's Designation of Contents of Record on Appeal; Appellee's Designation of Additional Contents of Record on Appeal; Stipulation re Exhibits and Order re Exhibits which, together with Original Plaintiffs' Exhibits 1 and 2 and Original Defendant's Exhibits B, C, D, E, G, H, I, J, K, L, M, N and R and copy of four volumes of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$11.80 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of May, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Title of District Court and Cause]

Honorable J. F. T. O'Connor, Judge Presiding

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Los Angeles, California

Wednesday, October 23, 1946

Appearances:

For the Plaintiff: Herbert V. Walker, Esq., and Charles
Beardsley, Esq.

For above Defendant: Prentiss Moore, Esq.

For United Van and Storage Assoc. and California
Van and Storage Assoc., as amicus curiae: Wyman C.
Knapp, Esq.

* * * * *

Mr. Beardsley: * * * I would like at this time to
move the court for authority to amend the complaint to
correctly set forth the names of these plaintiffs.

The Court: The motion will be granted.

Mr. Beardsley: The name, if the court please, of
"Louis Kanik"—these, in general, are in alphabetical
order—it should be "Kanir" rather than "Kanik",
"K-a-n-i-r" instead of "K-a-n-i-k". And similarly, the
name "Holden" in the complaint, it should be "Ira C.
Holder", "H-o-l-d-e-r"; and the name "Emery Keyes",
"K-e-y-e-s", should be "Emery Key", striking off the
"e-s-"; and the name which we have listed "Mable Fur-
hite"—that is under the "F's" in the complaint, should be
"Noble F. White," "N-o-b-l-e", initial "F. W-h-i-t-e";
[4*] and the name in the first one of the group of plain-

*Page number appearing at top of page of Original Reporter's
Transcript.

tiffs added in the caption of the amended complaint, "Emery Kelly" should be stricken out. That was an error from reading the name "Emery Key" which was so written that we made that mistake.

I ask leave of the court to have that amendment made on the complaint.

Mr. Moore: What was the last one, Mr. Reporter?

Mr. Beardsley: "Emery Kelly" stricken out. It refers to the same one as "Emery Key."

Mr. Moore: "Emery Kelly" is the same?

Mr. Beardsley: Yes. So just strike out "Emery Kelly." There is no such person that we know about.

I have prepared a very brief trial memorandum which I should like to submit to the court. And, if the court please, I think that in a very brief opening statement it might be possible, with Mr. Moore's cooperation, to narrow the issues somewhat.

As your Honor knows, this is a complaint brought under the Fair Labor Standards Act for overtime alleged to be due these various plaintiffs. As stated in the little memorandum which I have handed to the court, we do not claim that they were not paid time and a half for hours more than eight hours in any particular day that they worked.

The overtime compensation which we are seeking is for hours worked beyond 40 hours in any work week, and it is our [5] contention that the practice was that the defendant worked its employees a 48-hour week, that is, an eight-hour day on Saturdays. Many of the men worked additional hours on various days, including Saturdays, but when they worked more than eight hours in a day they were paid overtime on that basis.

When your Honor referred to the bill of particulars yesterday I had in mind the request we made of the company that it make up from its records a statement as to the dates of the employment of each of the plaintiffs of the hours they worked in each week and so on. That information was supplied to us informally. It has not been filed with the court, but it shows generally that the men worked 44 hours a week; in other words, that there were four hours of time which was not compensated at the time and a half rate. [6]

* * * * *

Mr. Moore: * * * It is our offer at this time in view of that to suggest to the court that if the court feels that any period of time it would like to take as a test, the defendant will offer the court the privilege of designating the referee or taking the facts and figures of the auditor and manager of the local concern, that is. the Coast Van Line, which has attempted to research this problem. And we have one very detailed method which we took which we felt was the worst from the standpoint of the defendant's position, and have broken that down in detail to indicate all types of operations that were carried on.

The amount of time consumed will run approximately 100 to 150 hours for each month, with the service of about four people, to make a month by month analysis of these to determine each of the factors involved.

But the company takes the position that if the court cares to indicate what it should like to do in the matter, they will undertake the expense or, if you prefer, to have the plaintiffs join with them in providing whatever period of time the court needs. [13]

* * * * *

ESTEL C. JAMISON,

called as a witness by plaintiffs, being first sworn, was examined and testified as follows: [33]

* * * * *

Direct Examination

By Mr. Beardsley:

Q. Mr. Jamison, what is your present residence address? A. 11005 Buford Avenue, Lennox.

Q. That is in Los Angeles County?

A. Yes, sir.

Q. Were you at some time associated with the defendant in this case, Coast Van Lines, Incorporated?

A. Yes; I was the first vice-president of the Coast Van Lines.

Q. Were you a stockholder for a time?

A. A stockholder; yes, sir.

Q. Did you take some active part in the business as an employee?

A. Yes; as warehouse superintendent and timekeeper.

Q. And what was the period of your connection with the company?

A. Well, from '41 to '45, March the 15th of '45. [34].

* * * * *

Q. By Mr. Beardsley: Mr. Jamison, do you know whether any of the work of the company during the period you were there had to do with the Navy contract for the packing, crating, and shipping of Naval personnel goods?

A. Yes; it did.

Q. Can you say approximately what proportion of the work of the company was on that?

Mr. Moore: The same objection, calling for a conclusion of this witness and not the best evidence. [36]

(Testimony of Estel C. Jamison)

The Court: Overruled.

A. Well, for different years, of course, it varied as to the different amount of time spent on the contract. At times, why, I would say it was as high as 60 per cent of it.

The Court: Give us the others. You just gave us one figure, 60 per cent.

The Witness: Well, it ran all the way from 50 to 60 per cent, I would say.

Q. By Mr. Beardsley: In your work as warehouse foreman will you tell us just what operations of the company you had under your immediate supervision?

A. All the storage of the household goods.

Q. Was the crating or packing under your supervision immediately? A. No, sir; it was not.

Q. Mr. Jamison, while your immediate duties as warehouse foreman did not involve supervision of other activities of the company, did you as vice-president of the company have knowledge of the general method in which this Navy contract work was done? A. Yes.

Q. You do have that knowledge as an officer of this company? A. Yes, sir.

Q. Can you describe to us what that work was, that is, did employees of the company go to the persons' homes and pack [37] their goods and so on? Just tell us what was done.

A. Well, packers were sent to the homes to pack their dishes and bric-a-brac, clothing, linens, and those things; and the trucks were dispatched to bring them into the packing shed, and the packing crews packed and crated those things that were to be packed and crated for ship-

(Testimony of Estel C. Jamison)

ment; and if they were to be shipped, they were shipped on out by rail; if not, they went to storage.

Q. Was there a converse operation as to goods coming into this area of Naval personnel? Did you have anything to do with those?

A. Yes. We had deliveries brought from both the Naval supply depot and forwarding companies.

Q. Would they be similar goods, household goods of Naval personnel?

A. Goods coming in, yes, would be taken out and uncrated and put back into the homes.

Q. That is, goods coming in from other states?

A. Yes.

Q. You spoke of shipping out. Would that be shipping out into other states than California?

A. Yes.

Q. Did the company also handle other freight, other than household goods of Naval personnel?

A. No; purely in the line of household goods. [38]

Mr. Beardsley: That is all. You may cross examine.

The Court: And were these goods and personal articles picked up at the house; picked up and put into a van, were they?

The Witness: Yes; a moving van.

The Court: And where did that van travel to?

The Witness: Well, for two years we had our packing plant in the Long Beach area. They were carted to the Long Beach area and then they were later carted to the Los Angeles area during the latter years.

The Court: From what points? Where were these houses or homes from which the goods were taken?

(Testimony of Estel C. Jamison)

The Witness: A certain area in Los Angeles, practically all of Los Angeles County and some of Orange County.

The Court: And none of it was actually taken out of the state?

The Witness: No.

The Court: All right; proceed.

Mr. Beardsley: You may cross examine.

Cross Examination

By Mr. Moore:

Q. Mr. Jamison, in the last four months of 1942, September, October, November, and December of '42, what percentage of the time of the firm was spent on the Navy contract that you speak of in the moving of household goods? [39]

A. Oh, I would say about 60 per cent of it.

Q. Now, taking the first six months of the year 1943, what per cent of the time of your firm was spent on the moving of Naval personnel's household goods?

A. I would say about 60 per cent during that time.

Q. That is, from January to June of 1943?

A. Yes.

Q. And from June to—

The Court: The last six months?

Q. By Mr. Moore: From June to December of 1943 what percentage of time? A. About 60 per cent.

Q. And from January of 1944 to June of 1944 what percentage of time was spent on Navy contract work?

A. About 55 per cent.

(Testimony of Estel C. Jamison)

Q. And from June to December of 1944 what percentage of the time of the Coast Van Lines was spent on moving household effects of Navy personnel?

A. About 60 per cent.

Q. You left the firm when?

A. In March of '45.

Q. In March of '45. From a period of January to March, 1945 what per cent of the firm's time was spent handling Navy personnel goods?

A. About 50 per cent. [40]

Q. From what records or information have you drawn these conclusions, Mr. Jamison?

A. From the waybills and time cards.

Q. All right. Taking their waybills, what records did you keep of the waybills?

A. Well, we had a file of waybills that showed what moved in the Navy and what moved as individuals.

Q. Do you have those in your possession?

A. They were available for my immediate inspection.

Q. Did you ever take the waybills for the period, say, of January to July, 1944, and analyze the percentage of waybills which were under Navy contract or under any other type of business?

A. No, sir; I never did.

Q. So that you have no independent knowledge from an examination of the records yourself, is that correct?

A. Just by my general knowledge of what was done.

Q. Just a conclusion on your part, is that right?

A. That is right.

Q. Where was your place of business during this time as a warehouse superintendent?

A. 819 Maple Avenue and East Third.

(Testimony of Estel C. Jamison)

Q. I am sorry. I did not hear the first one.

A. 819 Maple Avenue and 423 East Third Street.

Q. Do you know the destination of any of the goods which your firm serviced? [41]

A. Yes; I have seen innumerable bills of lading that stated the destinations.

The Court: What were the destinations? That is what counsel asked.

A. Well, Washington, D. C.; there has been innumerable shipments there. Seattle, Washington.

Q. By Mr. Moore: California?

A. Yes; there has been made to California, as well, San Francisco.

Q. A great deal of the Naval personnel moved between Alameda and San Diego and Los Angeles, isn't that correct? A. No; I wouldn't say that.

Q. Well, you don't know, do you, what the destinations were or—

A. Various destinations would be all that I would be able to say; yes, sir.

Q. And these men who, you described, went out and packed up these household goods might one day work upon the goods which moved to Washington, D. C., or might work upon goods which moved to Alameda, California the same week? A. That is right [42]

* * * * *

HENRY C. RETZER,

called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Henry C. Retzer.

Direct Examination

By Mr. Beardsley:

Q. What is your present residence address, Mr. Retzer?

A. 6103 West Drexel Avenue, Los Angeles 36.

Q. What is your business or occupation; that is, in what line of business are you engaged?

A. At the present time?

Q. Yes.

A. I am extension counsellor for a Teamster International of St. Louis.

Q. Have you been engaged in the van and storage business some part of your lifetime?

A. Some 29 years.

Q. Have you been active in the association of that [43] business?

A. I was president of United Van and Storage Association for two terms.

Q. Were you at any time connected with the defendant, Coast Van Lines?

A. That is correct.

Q. What was the period of your connection?

A. Well, I have worked for them years back. I would not recall the years. In San Francisco, and then after I moved to Los Angeles in 1943 I returned to their employ in San Francisco as sales manager for them.

(Testimony of Henry C. Retzer)

Q. When, if at all, did you work for them in Los Angeles?

A. When they purchased the Coast Van Lines I was transferred to Los Angeles.

Q. And that was in what month, do you recall?

A. I believe September or October of '43—'44.

Q. For how long a time did you work with Coast Van Lines here in Los Angeles?

A. Until the end of May, '45.

Q. What was the nature of your work there during that period?

A. I originally started handling sales and then my position was changed to one of manager of operations.

Q. And for how long a period did you hold that last position, manager of operations? [44]

A. I would say the last six months of my employment there or seven months.

Q. In your work as manager of sales or handling sales in the earlier part of your connection with the company here in Los Angeles what was the general nature of your duties?

A. Estimating and soliciting business for the company.

Q. And in the latter part, when you were manager of operations, just what was the general nature of your work?

A. I had charge of all departmental heads in the operating end of the business, the employment of labor and discharge of labor.

Q. Were you a stockholder or officer of the company?

A. No, sir.

(Testimony of Henry C. Retzer)

Q. Did you have an opportunity to observe what, if any, proportion of the company's work had to do with the Navy contract, moving?

A. I did not have access to actual records or contracts, other than the performance of the work. I knew that the major performance of their operation was Navy.

Mr. Moore: Just a moment. I object to the last as volunteered and not within the question asked, and ask it be stricken.

The Court: Yes; I think that is correct. Strike it out.

Q. By Mr. Beardsley: What proportion of the operations of the company were in the Navy contract, moving? [45]

Mr. Moore: Just a moment. Calling for a conclusion of the witness. He testified it was not within his knowledge and he did not have any contact with the records at all.

The Court: Well, that would not be the records. In other words, if a man saw five vans coming from San Pedro to here, it would not make any difference what the records were. I assume that is what the evidence is.

Mr. Beardsley: He said he was manager of operations and had—

The Court: Proceed.

A. Well, in my opinion, I think that Mr. Jamison was conservative when he said 60 per cent. I would say in excess of 60 per cent, from my observation.

Q. By Mr. Beardsley: Do you know from your own observation what proportion of that material or those goods was going in interstate commerce, that is, between states, as distinguished from within California?

(Testimony of Henry C. Retzer)

Mr. Moore: Just a moment. Again, calling for a conclusion of this witness; no record of best evidence before this court, no proper foundation laid for his testimony.

The Court: I think a better foundation should be laid. It is just a question right out of the air to this witness.

Q. By Mr. Beardsley: As manager of operations did you observe from what points and to what points shipments were traveling? [46]

A. Not the actual shipping. I had no part of the actual shipping.

The Court: No; that is not the question. Read the question.

(Question read by the reporter.)

A. No; I did not. That I did not have access to.

The Court: No. That is not the question.

The Witness: I mean the points that they were shipping to, Judge, your Honor.

The Court: You said you did not have access to it.

The Witness: To the bills of lading that would bear that information.

The Court: All right.

The Witness: Do you see what I mean?

The Court: Yes. The question is answered.

Q. By Mr. Beardsley: Do you know whether or not goods were being crated and packed for shipment outside California? I am asking whether you knew.

A. I do, from the stencil marks on the crates.

Q. Did you see the goods moving, then, and see the places to which they were marked?

A. That is correct. The stencil marks on the crates I did see.

(Testimony of Henry C. Retzer)

Q. Would you tell us what proportion of the goods were traveling or were stencilled to travel in interstate commerce? [47]

Mr. Moore: Object to the question. The witness has testified that he had no knowledge of that information.

The Court: No. The witness just testified that he saw marked in stencils on the crates where these boxes were to be shipped. Now, that is the best evidence.

Mr. Moore: I believe the question in this case was directed toward the percentage, your Honor.

The Court: Read the question.

(Question read by the reporter.)

The Court: Can you answer that yes or no?

The Witness: I can, sir.

The Court: All right.

The Witness: In my opinion, about 75 per cent.

The Court: Of what?

The Witness: Was out of the state.

The Court: Does that just refer to the Navy goods or does that refer to the general business of the corporation?

The Witness: That refers to the Navy goods.

The Court: All right.

Q. By Mr. Beardsley: Did some of the other goods handled by the corporation during this period, that is, other than Navy contract handling, travel in interstate commerce? I am asking you to base your answer on what you observed of the markings of the goods.

A. I would have to go into a little detail to explain [48] that.

The Court: Go ahead.

A. In many instances where various officers of the Navy would be placed in this area and, of their own

(Testimony of Henry C. Retzer)

choosing, wished to transfer at their own expense, in those cases they would ship their own goods out of the state. In those instances I have seen a fair percentage of them.

Q. By Mr. Beardsley: Those instances you now refer to were outside of the Navy contract work?

A. That is correct. I would say probably 40 per cent of those.

Q. 40 per cent of those outside the 75 per cent of those inside of the Navy contract?

A. I would think that.

Q. Can you answer this question from your knowledge of the business and your experiences as manager of operations? Was there a substantial amount of business of this company being carried on which did not affect either Naval freight or Navy contract jobs or private jobs for Naval personnel, as you have just stated?

A. Not substantially; no, sir.

Mr. Moore: May I have the answer, Mr. Reporter?
(Answer read by the reporter.)

Q. By Mr. Beardsley: Putting it another way, most of the work that was done was either on Navy contract or for Naval [49] personnel, is that correct?

A. That is correct.

Q. Can you describe just what was done under your supervision when you were manager of operations about these goods which were picked up and handled under the Navy contract for Naval personnel? Can you tell just what operations were performed by the company and its various employees?

A. My principal duty was on performance of the actual work, to see that the work would be done as quickly

(Testimony of Henry C. Retzer)

as possible and with as little overhead as possible. I did come in contact with the actual labor situation through observance of time cards, and my office adjoined the dispatching office where all the dispatching was taken care of. I don't know that that answers your question. Principally, you asked me what my duties were.

Q. No. I want to know whether, by reason of your duties, you know just what this company did when it moved a man's goods.

A. How they performed the service?

Q. Yes; that is right.

A. Packers were sent to the homes to pack the loose and breakable articles, articles that could not be transported without packing. After they completed their packing, sometimes on the same day and sometimes on the following day, a truck would be dispatched to pick the goods up and bring them into the warehouse or whatever the disposition would be in accordance [50] with that particular job. If it would be held in storage until further disposition was ordered, then it would be placed in storage. If it were to be packed for shipment, it would be placed in the packer room. If it was a van line order going to any point within the state, they would then load it on the van and a van line driver would take that to San Francisco or whatever the point would be.

Q. All right. Now let me take these operations separately. The first operation was that men would go out to the house and pack the china and loose things?

A. That is correct.

Q. Would those men go out there in a truck?

A. No. They were packers.

(Testimony of Henry C. Retzer)

Q. How would they go out there?

A. They would use a truck in which they loaded their material to take it on the job; yes, sir.

Q. If there was a freight shipment there would they actually be the persons who brought it back in?

A. In some instances they were used for that purpose and in some instances they were not.

Q. Were they the same persons who would haul it on a van line between cities?

A. No; the line drivers had nothing to do with it, The only thing the line drivers would do, if they would pack where packers were not accessible to that point, they would [51] bring the goods into the warehouse.

The Court: Where was the warehouse located?

The Witness: On 423 East Third; and then they had a warehouse on Maple, and they had one on Margo.

The Court: Where were they officing?

The Witness: On Third Street.

The Court: Where you were operating?

The Witness: That is correct.

The Court: Any other office in this state?

The Witness: No other office in this state to my knowledge other than the firm itself had an establishment in San Francisco known as the Market Street Van and Storage.

Q. By Mr. Beardsley: When goods were shipped outside of the State of California where were they put on some interstate carrier, at what place?

A. They were loaded off their loading platform into freight cars.

Q. Where was that, at which of these warehouses?

A. At Third Street.

(Testimony of Henry C. Retzer)

Q. At Third Street?

A. That is where the railroad siding was.

Q. Did the employees of this company actually board the cars and put the furniture in?

A. They braced it and everything, packed it for shipment.

Q. Did they put it in the cars? [52]

A. Loaded it in the cars and braced it.

Q. Do you know whether there was the converse of that operation going on with goods coming into this area from outside the state?

A. Yes; some came in by motor truck and some came in by freight.

Q. What would the employees of this company do with that type of merchandise coming in from outside of the state?

A. That was placed in storage, held for disposition of the owner of the goods, or whatever the disposition might be. If an address was available at the time the goods were received, then they were delivered to the individual at the residence, uncrated and placed in the house. If there was no disposition at the time the goods arrived, then they were placed in storage and held for future disposition.

Q. Did the employees of this company, then, where there was an address available, take the goods there and uncrate the goods? A. That is correct.

Q. Do you know from your work there, your responsibility there, Mr. Retzer, what proportion of the time of the men who were packers, who went out, as you have described, to these locations and packed the goods, what proportion of their time was spent in driving or

(Testimony of Henry C. Retzer)

trucking, and what proportion in the operations of packing? [53]

A. Well, packers were employed as packers. The only occasions they had to travel by truck was a means of transportation to and from their job.

Mr. Moore: I am going to object to that as being a conclusion of the witness and not responsive to the question.

Mr. Beardsley: I think that the answer, perhaps, is not completely responsive, but it was coming out. I think it is matter which should be in the record.

The Court: Ask him again.

(Question read by the reporter.)

The Court: Now, you must answer that, first, yes or no.

A. Yes, sir.

Mr. Beardsley: Wait, now.

Q. Will you tell us what the proportions were?

A. 90 per cent of the time packing and about 10 per cent driving.

Q. By Mr. Beardsley: In your former answer which was stricken, you started to explain to us how the packers used a truck, to what extent their truck was used by them. Will you tell us what that is?

A. Packers had small, bob-tailed trucks, as they called them, on which they hauled their packing materials such as barrels, boxes, excelsior, paper and so on to the job, which also enabled them to bring unused material back in the same unit. [54]

Mr. Beardsley: You may cross examine.

(Testimony of Henry C. Retzer)

Cross Examination

By Mr. Moore:

Q. When did you say your employment terminated, Mr. Retzer, with Coast Van?

A. I believe it was May, 1945.

Q. Is it Retzer, R-e-t-z-e-r?

A. That is correct.

Q. It terminated in May of '45?

A. That is correct. I am quite positive it was May, the end of May or beginning of June.

Q. The office records and files were kept in a different part of the building from where you operated as a dispatcher or handling the operations or estimator, whatever it is you did, on the lower floor, isn't that correct?

A. My office was on the lower floor. At first, my office was at Margo until the building was completed at Third Street which was under reconstruction due to a fire.

Q. And for compilation of the records of the company what access did you have to them?

A. If I wanted any access, I could have had access to them. I had no occasion to.

Q. If you had no occasion to, you had no access.

The Court: No; he did not say he did not have access. [55] He said he did not have occasion to have access.

Q. By Mr. Moore: But the answer is that you never did examine the records of the business done by the company over, let us say, a weekly or a monthly or a six months' period, is that correct?

A. I had no reason to examine them.

(Testimony of Henry C. Retzer)

Q. Well, your answer is that you did not?

The Court: He said he did not. He said he had access but he did not have occasion.

Mr. Moore: As I understand him, he said he had no reason to.

The Court: Well, all right. If he did not have any reason to, he did not do it.

Q. By Mr. Moore: When you said the Navy operations were in excess of 60 per cent what period of time did you mean for that to cover?

A. The end of the year in 1944, when I took over operations, which was possibly the month of November. I would not have those dates, didn't feel the need of bringing that information with me. However, I can provide it through pay vouchers from the end of November until my termination there.

The Court: November of what year?

The Witness: November of 1941.

The Court: To May, 1945?

The Witness: That is correct. [56]

The Court: All right.

Q. By Mr. Moore: As I understand it, you gave us that from November, 1944 until the termination of your service?

A. That is correct.

Q. Was the period you speak of in which the Navy operation or the Navy contract operations of the company were in excess of 60 per cent of the work?

A. That is correct.

Q. Did you make any estimation for the period from September, 1943 up to November of '44?

A. September, 1943 I was in San Francisco.

The Court: In San Francisco?

(Testimony of Henry C. Retzer)

The Witness: Yes, sir.

Q. By Mr. Moore: When did you come to Los Angeles? A. September, 1944.

Q. What were those estimates, or what records, rather, were those estimates based on that you have just given us of 60 per cent? A. Observation.

Q. Don't you know it to be a fact that almost three to two of the operations of the company in that period covered business other than the Navy contract?

The Court: I will permit that to be asked, but it is argumentative, counsel. Answer it if you can.

The Witness: I don't understand the question at all. [57]

Mr. Moore: Withdraw the question.

Q. What facts were your observations based on?

A. Experience.

The Court: He is giving these as estimates.

The Witness: On experience.

The Court: All right.

Q. By Mr. Moore: Just giving these estimates?

A. On experience I have and knowledge.

Q. Experience of what?

A. Of my knowledge of the business and observation of the—I certainly would not have been placed in the position of manager—

The Court: No, no. Strike that out. That is not responsive to counsel's question.

The Witness: I didn't understand his question.

The Court: Just a moment. We will have it read. It is very clear.

(Testimony of Henry C. Retzer)

(Question read by the reporter.)

A. What were those based on? Actual existing facts, is about the only way I can answer it.

Q. By Mr. Moore: What were those facts?

The Court: Counsel means did you just see these and note them in your memory or record?

The Witness: I answered that, your Honor, as observations, before. [58]

The Court: And "observation" is a very general term. Counsel is asking you, properly, for some more specific details.

The Witness: I see.

The Court: Of just how you get such a figure.

The Witness: Could you enlighten me as to what the procedure would be to define that particular thing? When you say "facts", could you define what you mean by "facts" in this particular instance?

Q. By Mr. Moore: I am asking you, Mr. Retzer, to tell us what facts you base your conclusion upon that the Navy contract from November, 1944 to the time you left in May of 1945 consumed 60 per cent of the operations of the Coast Van Line's business.

A. Actual facts with my contact with the departments that were handling the work.

Q. Did you ever make a compilation of the records of the warehouse department to determine that?

A. They had an accounting department for that purpose. That was not part of my duties.

Q. Did you ever make— A. I did not; no.

Q. Did you ever make a compilation of the records of packing and crating? A. Cost is all.

(Testimony of Henry C. Retzer)

Q. Did you ever make a compilation of the records of [59] the packing and crating department?

A. No, sir.

Q. To know what part of it was done in the Navy contract or in other business?

A. I did not as a comparison; no.

Q. Did you ever make an examination of the records of the transportation to determine what part of it was Navy or otherwise?

A. I told you before I had no occasion to examine records.

Q. Did you ever make an examination of the records to determine what per cent of the business done other than Navy flowed intra or interstate commerce?

A. I had no occasion to. There was no request for it in my duties.

Q. Upon what facts did you make your estimation of the 40 per cent of all other business outside of the Navy contract was interstate commerce?

A. Actually through observation, as I said, in seeing the markings on shipments and consignments and their destinations—observation.

Q. Did you ever operate as the dispatcher, or did you ever stand on the dock during the course of most of the days and see everything that flowed in and out?

A. Yes; I did. My office was right adjoining the [60] dispatcher's office.

Q. And you examined most of the crates that came and went out, and observed their destinations and made your estimation upon that information?

A. That is correct.

(Testimony of Henry C. Retzer)

Q. What was the tonnage of goods that were hauled between Los Angeles and San Francisco by Coast Van Lines; or, we will put it another way: What percentage of the total transportation during the month of November, 1944 was shipped between Los Angeles and San Francisco?

A. That would reflect itself on their records, which, as I tell you, I did not refer to.

Q. I mean from the same observation you have made of the destinations that these things went to, I want you to estimate for us the percentage of the business that was carried between Los Angeles and San Francisco.

A. The business was divisional. Now, what business have you reference to, the general public or the Navy?

Q. I mean all business that was done by the firm in the month of November, 1944, what percentage of it would you estimate flowed between Los Angeles and San Francisco?

A. Oh, I would say you could divide it in half, 50-50.

Q. 50-50?

A. 50 per cent highway, 50 per cent—

Q. 50 per cent of the business done was carried between [61] Los Angeles and San Francisco during the month of November, 1944?

A. Not necessarily San Francisco. I would not select San Francisco as the terminal point, because the goods were shipped to all parts of California, various towns, intermediate places.

Q. I am asking you now just with the same observation. You observed these other things.

A. If it is San Francisco, I would say 20 per cent of it.

(Testimony of Henry C. Retzer)

Q. Just a moment. Let me finish my question, please. What percentage of the transportation hauled during the month of November, 1944 was hauled between Los Angeles and San Francisco?

The Court: The witness answered that he estimated 20 per cent, counsel. That is of the total, not limited to just the Navy, is that it?

Mr. Moore: Of the total business done.

The Court: All right.

Mr. Moore: 20 per cent was hauled by vans?

A. That is my estimation.

Q. What per cent went to other northern points of California outside of San Francisco?

A. To be honest with you, that invites guessing. I would not like to guess. I can provide that information, however. I do not like to testify on a guess basis. I like to [62] testify as nearly as I know. I wouldn't have any idea, but it reflects itself.

Q. Mr. Retzer, do you have substantiation of these facts you have testified to today?

A. A lot of that was internal, when I told you on crates my time was confined inside.

The Court: Now, you have not answered counsel. Read counsel's question.

(Question read by the reporter.)

A. What I have testified to today I can substantiate; yes, sir.

Q. By Mr. Moore: Do you have it by a written document? A. No, sir.

(Testimony of Henry C. Retzer)

Q. What type of substantiation have you?

A. The various men who were in charge of the various departments in their particular lines of duty have, and they have substantiated it.

Q. I see. But not of your own knowledge do you know any of the facts or figure which you have given today?

A. Purely from observation, as I have stated before.

Mr. Moore: I move to strike the witness' testimony in whole as to any information given—

Mr. Beardsley: Oh, well.

Mr. Moore: —as based on hearsay, and coming from these other witnesses. [63]

The Court: Denied. It goes to the weight of the testimony.

Q. By Mr. Moore: A driver taking a truck out to pack goods at a residence, who goes to—I think you described Orange County, is it, where you did some of your business?

A. I did not specify Orange County. Mr. Jamison mentioned Orange County.

Q. Oh, Mr. Jamison. A man going to San Fernando Valley to pack 200 pounds of goods would take a pickup truck and a helper and go with his packing equipment to that address, is that correct?

A. That is correct, or whatever truck would be available.

Q. Yes. He would pack and crate the bric-a-brac, the small articles, and after packing it he would put the

(Testimony of Henry C. Retzer)

200 pounds on the pickup and he and the driver would return to the warehouse with it, is that correct?

A. If it were a small consignment, as you were referring to, 200 pounds it would naturally be the justifiable thing to do. It would not be to send another truck out to pick it up. If it was four or five thousand pounds, a separate unit is sent out to pick it up.

Q. How much time, from your experience, would it take, Mr. Retzer, to go to Van Nuys, pack 200 pounds, and driving time consumed between Van Nuys and the warehouse each way? What time would it take to do the actual packing and what time [64] would it take to do the actual driving?

A. It is an unfair question, because how much are you asking me in regard to how much must be packed, what quantity?

Q. I said 200 pounds.

A. 200 pounds. That would only be two barrels of china.

Q. All right. How long would that take to pack?

A. Three to three and one-half hours, for shipping.

Q. Three to three and one-half hours for 200 pounds?

A. That is correct.

Q. Now then, how long would it take—

A. That is for a slow packer.

Q. And what for an ordinary packer?

A. Two and one-half hours.

Q. Two and one-half hours?

A. That is right.

Q. How long would it take that driver and helper to drive from the warehouse on Third Street to an address in the center of Van Nuys?

(Testimony of Henry C. Retzer)

Mr. Beardsley: Oh, that is objected to as clearly speculative.

The Court: Yes, counsel; that is highly improper. It kind of depends on the time of the day, if he is going at a time when there is little or no traffic, or if he is going at a time when traffic is congested, or if he is going at a [65] time when there is an average flow.

Q. By Mr. Moore: What is the average length of time during daylight hours that it would take your driver to drive to Van Nuys?

The Court: It is immaterial. Exception allowed to the defendant.

Q. By Mr. Moore: Well, upon what information, Mr. Retzer, do you base your conclusion that 90 per cent of the time taken is spent packing and 10 per cent of it driving?

A. That is correct. A packer was employed as a packer, not as a driver.

The Court: Now, you did not answer counsel's question.

The Witness: That is what he was employed for and that is all that he did.

The Court: No. That is not answering counsel's question.

The Witness: On what do I base the fact?

The Court: Read the question.

(Question read by the reporter.)

A. The man was directly under my employ. Would that be sufficient?

Mr. Moore: May I have the last answer, please?

The Witness: You asked what I base that on.

(Testimony of Henry C. Retzer)

The Court: Wait a minute. Counsel asked to have the question read.

(Answer read by the reporter.) [66]

Q. By Mr. Moore: All right. Now, he was directly under your employ. And from what facts, figures and other information did you arrive at this conclusion that packers spent 90 per cent of their time packing and 10 per cent of their time driving? In other words, from an examination of waybills, from an examination of—

A. Oh, I see. What type of records were evidence to that effect? Packing slips. They had a packer's slips that accompanied the packer to the packing job. In other words, on that he would list the amount of material he used, the number of hours that he had packed on the job. That is the evidence that exists for that time. It was from those records, which I had access to them and they went through my hands before they went into the office.

Q. How many packers did you have?

A. It varied, depending with the amount of business at the time. I would say from seven to any number, 10, 11, 12. Some were temporarily employed to take care of a rush situation and they were discharged after the rush.

Q. Did you ever have a packer make a freight delivery on his way to do a little packing job?

Mr. Beardsley: Oh, that is objected to as not material.

A. Not to my knowledge.

The Court: Oh, I will allow the answer.

A. Not to my knowledge. [67]

(Testimony of Henry C. Retzer)

Q. By Mr. Moore: Did you say that your duties included that of an estimator?

A. That was my first duty, as I explained to you.

Q. What are the duties of an estimator?

The Court: I do not suppose that is material. It is what he did as an estimator, counsel. Is that what you want?

Mr. Moore: Yes.

Q. What did you do as an estimator?

The Court: What did you do?

A. At various instances where they had requested an estimate as to the cost of their service, I would make a survey of their furnishings in the home and determine an approximate estimate as to their cost of packing, transportation, or whatever the case may be. If it was a van line shipment, then it was the packing plus the van line shipment. If it were a crating job, it was the preliminary packing and their crating, all based on the ultimate certified weight at the conclusion of the packing.

Q. By Mr. Moore: Anything else?

A. That was an estimator's duty, and, of course, to secure the order.

Q. Did you ever suggest how various articles should be packed?

A. We did the packing. We did not ask the customer to do the packing. [68]

Q. Did you ever recommend wardrobe service?

A. Wardrobe service is the service that I am the father of 20 years ago.

Q. And I assume you recommended that?

A. Definitely.

(Testimony of Henry C. Retzer)

Q. Did you ever suggest the service of a plumber in disconnecting the sewage?

A. If the question were asked and they didn't have ways and means of disconnecting the stuff, we recommended a plumber for them.

Q. Did you ever suggest the advisability of making a change of address on their insurance or for their papers to be forwarded?

A. If they were storing their household effects, they were advised to transfer their insurance to the warehouse; yes, sir.

Q. Did you ever advise the purchasing of moving insurance? A. I recommended it.

Q. You did that with anybody you went out to see, didn't you?

Mr. Beardsley: Just a moment. I do not think this is material or proper cross examination.

The Court: I will permit it to go in for what it is worth. [69]

The Witness: What was the question again, please? (Question read by the reporter.)

A. Not for a local move from one house to another. On that occasion I didn't recommend insurance. But if it were going any distance, I did.

Q. By Mr. Moore: Did you recommend the treating of rugs? A. That is correct.

Q. And other articles for preservation against moths?

A. That is the usual precaution in the industry.

Mr. Moore: That is all.

(Testimony of Henry C. Retzer)

Redirect Examination

By Mr. Beardsley:

Q. Mr. Retzer, you stated that you have been 29 years or you were 29 years in this business, is that correct?

A. That is correct.

Q. Were some of these estimates of proportion of time that a packer spent in packing and driving based upon your experience in the industry?

A. That is correct.

Q. As well as observing particular bills on particular jobs?

A. That is right.

Mr. Beardsley: That is all, I think. [70]

* * * * *

ERNEST R. FARMER,

called as a witness by plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Ernest R. Farmer.

Direct Examination

By Mr. Beardsley:

Q. What is your present residence address, Mr. Farmer?

A. 949 North Spaulding.

Q. Is that in Los Angeles?

A. Yes.

The Court: Beverly Hills, isn't it?

The Witness: No, sir.

Q. By Mr. Beardsley: Beverly Hills?

A. Los Angeles.

Q. Los Angeles. What is your business or occupation? [71]

A. I am a truck driver at present.

(Testimony of Ernest R. Farmer)

Q. Were you at sometime connected with Coast Van Lines, defendant in this action? A. Yes, sir.

Q. During between approximately what dates were you employed there?

A. From December, '43 to about July of this year, '46.

Q. And in what capacity were you employed?

A. As a dispatcher and assistant dispatcher and warehouse manager.

Q. And at what plant or location of the business were you employed, Mr. Farmer?

A. As a dispatcher, 819 Maple; as a warehouse manager at 423 East Third Street.

Q. Would you describe what your duties were as a dispatcher, just what you did?

A. Well, I had to dispatch all trucks to their duties.

Q. Were you familiar with the nature of the material which they picked up and brought into the warehouse?

A. Yes, sir.

Q. And did you have knowledge of the destinations to which it was eventually to go, whether within the state or outside the state? A. Yes, sir.

Q. Did you know whether or not the work which was being [72] handled was Navy contract or private work?

A. Yes, sir.

Q. During the period that you were so employed, the dates you have given, can you tell us approximately what percentage of the work was Navy contract work?

A. 75 per cent.

Mr. Moore: Objected to for the same reason, calling for a conclusion of the witness, not the best evidence, and

(Testimony of Ernest R. Farmer)

not the proper foundation laid as to the man's knowledge of records or that he kept them.

The Court: I understand that the records were burned. If you have the records, we will ask you to produce them.

Mr. Moore: What period will you say this witness' testimony is expected to cover?

Mr. Beardsley: He testified from December, 1943 to July, 1946.

Q. What proportion of the material was traveling outside the state as between this state and other states as distinguished from within California?

A. I would say 70 out of the state and 30 in the state.

The Court: 70 per cent of the total business of this company was sent out of the state and 30 within the state?

The Witness: Yes, sir.

Q. By Mr. Beardsley: During this time did you have anything to do with shipments of material which came from [73] elsewhere, came from other states into your place here in Los Angeles and were sent out locally?

A. Oh, yes, sir.

Q. Was there some considerable amount of that sort of business which originated outside of California, things shipped in here for Navy personnel?

A. Quite a bit. [74]

* * * * *

Q. By Mr. Beardsley: In your work as dispatcher, Mr. Farmer, were you the person who would send out packers with a small truck to do packing work?

A. Yes, sir.

Q. Will you describe just what was done in that regard? I want to know now about approximately the

(Testimony of Ernest R. Farmer)

proportion of time of those men which was spent in driving trucks.

Mr. Moore: Your Honor, I am going to object to leading questions that counsel continues to ask the witness on direct examination, to produce a desired effect, whatever it is he wants, but I do not think it is proper. I am going to object [76] at this time.

Mr. Beardsley: Oh, I submit it is not a leading question.

The Court: Repeat the question, please.

(Question read by the reporter.)

The Court: What part of it is leading, counsel? A leading question suggests the answer of the witness. If there is anything in this question that suggests the answer, whether it is one per cent or 90, I do not see it. What part of it is leading?

Mr. Moore: The leading part is the specification of what is wanted. I mean this man can describe whatever operation he wants.

The Court: Suppose counsel does not want him to tell about the hours the men came to work in the morning. The witness must be given an idea of what he should answer, and I do not know of any other way to present it than counsel has. He directs his attention to what he wants and does not suggest the answer, which is always the objectionable part of a leading question. This witness can say one per cent or 99 per cent. The court does not know. Answer the question if you can.

A. 90 per cent packing and 10 per cent driving.

Q. By Mr. Beardsley: And did those men who did packing, who went out with the small truck and materials,

(Testimony of Ernest R. Farmer)

do any line driving, that is, driving vans between cities or on regular routes? [77] A. No, sir.

Q. About how many line drivers were there employed by this company during the time you were there, that is, at any time? What I want to get at is not the total number of employees you had during this period, but the number of drivers you had all the time driving the line, as you call it. A. From one to three.

Q. Will you define that term? Is that a term you use in your industry, "line drivers"? A. Yes, sir.

Q. What do you mean by that?

A. That means out of the city.

The Court: That is not clear. Read the question, and listen to the question now, Mr. Witness, and see if you can answer it.

(Question read by the reporter.)

A. A "line driver" is a driver employed to haul goods from one city to another.

Q. By Mr. Beardsley: Is he a driver who keeps a log of his hours at the wheel and so on?

A. Well, if he is going from state to state he keeps a log. I do not believe it is required in the state.

Q. These men who went out and picked up a small shipment or picked up goods at a house and brought them into the warehouse, did they keep logs? [78]

A. No, sir; not what we call "logs". They kept records of what they did and those hours for the day.

Q. Were those records kept for cost accounting purposes? A. I think so.

Mr. Beardsley: That is all. Cross examine.

(Testimony of Ernest R. Farmer)

Cross Examination

By Mr. Moore:

Q. Do you know Mr. Magnus?

A. Mr. Magnus. Yes, sir.

Q. What usual duties did he perform?

A. Mostly as a house packer.

Q. Did he ever do any line driving?

A. I think he did; yes, sir.

Q. Then, what you say is not true in all cases, that packers did not do any line driving?

A. Oh, no; certainly not. He might pack something, but the next year he might be a line driver.

Q. Maybe I misunderstood you. I thought you said a packer never did any line driving?

A. No. I meant while he was employed as a packer. Of course, there is exceptions, but that is not his duty. I was a packer and now I am a line driver.

Q. Is it your opinion, Mr. Farmer, that out of each day's operation a man who was engaged in the work of a packer [79] spent approximately seven and one-half hours packing and 30 minutes driving?

A. It averaged pretty close to that; yes, sir.

Mr. Moore: That is all.

* * * * *

BERT ARMSTRONG,

a plaintiff herein, called as a witness for plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Bert Armstrong.

The Clerk: B-u-r-t?

The Witness: B-e-r-t.

Direct Examination

By Mr. Beardsley:

Q. Mr. Armstrong, what is your present residence address? A. 1406 West Olympic, Los Angeles.

Q. Were you at sometime employed by Coast Van Lines, Inc., the defendant here? A. I was. [80]

* * * * *

Q. In what capacity were you employed?

A. Furniture crater.

Q. And where, at what location, at what business places? A. Well, Maple Avenue and Third Street.

Q. During all of that time were you employed as a crater? A. Yes, sir.

Q. Will you describe just what your work was, what duties you performed as a crater?

A. Well, when the goods were brought into the warehouse I was one of the men that crated them for shipping.

Q. Nailed them up in wooden containers, is that it?

A. Yes, sir; crated them and packed them.

Q. Did you have anything to do with marking them to indicate their destination?

A. No; I didn't have anything to do with that. That was done in another department.

Q. Did you see them after they had been marked?

A. Oh, yes. [81]

(Testimony of Bert Armstrong)

Q. Do you know to what destinations the goods were going which you crated?

A. Well, here is the way that came about: You see, we would be called upon lots of times to load cars. Naturally, we would segregate the lots and we will put them in cars according to destination.

Q. Was there any difference in the manner in which you crated goods for shipment by rail or for other shipments or for storage?

A. For storage—well, they were all shipped. They were all crated to be shipped ultimately, even if they went to storage temporarily.

Q. Do you know what proportion of the goods on which you worked were goods which were to be shipped outside of California, as distinguished from shipments within California?

A. Well, the fact is that the goods that were delivered locally we did not have much to do with; they did not require crating, you understand.

Q. They did not come into your department at all?

A. No, sir.

Q. What proportion, then, of the goods which did come into your department on which you worked and crated moved in interstate commerce outside of California?

A. Well, I would say all of them. [82]

* * * * *

Cross Examination

By Mr. Moore:

Q. Mr. Armstrong, you did not as a crater have many opportunities to see where the shipments were going, did you? [84]

A. Just as I repeated, when we had cars; yes.

(Testimony of Bert Armstrong)

Q. You did not get a chance to load a car very often, did you? A. Oh, yes; quite often.

Q. How often? A. Well, those—

Q. Once a week, once a day, once a month?

A. It averaged—well, we will say once a week. We will put it that way.

Q. That would be either loading it on a van or would be loading it on a car?

A. Freight car, a railroad car.

Q. A freight car. But you always loaded them onto a freight car; you never loaded any onto vans?

A. No. [85]

* * * * * * * *

Q. By Mr. Moore: Mr. Armstrong, did you ever crate and pack a shipment destined to the Navy supply officer at San Francisco or Vallejo?

A. (Witness nodding.)

Mr. Moore: I don't think the reporter can get the nod of your head. A. No, sir; I never did.

Q. Did you ever crate any article in the seven years you were there—

The Witness: Now, I will have to—

The Court: Wait, wait. You have not heard the question.

Q. By Mr. Moore: —destined somewhere within the State of California?

The Witness: Well. I beg your pardon. I did not hear the first question. I thought you asked me if I ever crated any for San Francisco. [86]

Mr. Moore: No.

The Witness: Well, then, I answered that wrong.

(Testimony of Bert Armstrong)

The Court: Just a moment, just a moment. Strike out the last two questions and answers, and let us have the record correct. Mr. Moore, ask the question.

The Witness: Yes; I did.

The Court: Now, just a moment.

Q. By Mr. Moore: While you were employed as a crater at the warehouse on East Third Street for Coast Van Lines did you ever crate and mark a shipment for the San Francisco Navy supply office or the Vallejo Navy supply office?

The Witness: The question was: Did I ever crate and mark?

Q. Yes. A. No, sir; I never did.

Q. Did you ever do any marking at all?

A. There is the point I am answering. I never done the marking.

Q. All right. Did you ever crate anything which had a tag on it destined for San Francisco Naval supply office?

A. Oh, I suppose so, yes; many times, I guess.

Q. In how many cases would you say you had crated something destined for San Francisco Naval Supply Office? A. That is very hard to estimate.

The Court: Well, as nearly as you can. You said that [87] you did, and just give us now your best recollection. Once a week?

The Witness: Well, your Honor, over a period of three years you run into those things once in a great while, you know.

The Court: I know it is very difficult.

The Witness: I can answer that this way: If it was shipped by truck, the answer is "no"; if shipped by rail, the answer possibly "yes".

(Testimony of Bert Armstrong)

Q. By Mr. Moore: How many times have you crated for rail shipments, the objects or the boxes designated "San Francisco"?

A. That would be better answered by trying to estimate how many shipments were made in that direction, because I usually got in on all of them.

The Court: Will you answer the counsel's question approximately, one a week or twice a week?

The Witness: Well, your Honor, there would be weeks there would be a lot of that stuff, and there would be weeks and weeks there would not be any of it in that direction, you know.

The Court: All right; that answers the question. Proceed, Mr. Moore.

Q. By Mr. Moore: How did you load these cars, Mr. Armstrong?

A. Well, we put the goods in them, stack them up and [88] brace them.

Q. Who would do that besides yourself, the other crater?

A. Well, we would have a couple of helpers. The crating department. Bricker was one of them, Chapel was one of them.

Q. And you would put it in, brace it and fill up the car?

A. Yes.

Q. You saw to it that the load did not shift within the car and made it safe to move it on the railroad?

A. That was part of the job; yes, part of the job.

(Testimony of Bert Armstrong)

Q. To the best of your recollection, did any of the cars that you ever loaded have a destination other than outside the state?

A. Oh, yes. We loaded them for practically every Naval base in America.

Q. Did you ever load any cars with a destination inside the state?

A. I don't remember of it, because, as I said, in the first place if we had a local shipment, it was very seldom put in a freight car. If it was a small lot, it would be a full lot to be dumped off some place.

Mr. Moore: That is all. [89]

* * * * *

EMORY KEY,

a plaintiff herein, called as a witness by plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Emory Key.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Key?

A. 831 Maple Avenue.

Q. Los Angeles? A. Yes.

Q. Have you been employed by the Coast Van Lines, Inc., the defendant here? A. That is right. [103]

* * * * *

Q. What was your classification or in what capacity were you employed there when you first went to work?

A. Well, when I first went to work, I went to work as a warehouseman.

(Testimony of Emory Key)

* * * * *

Q. What were you doing then?

A. I was packing and driving. [104]

* * * * *

Q. By Mr. Beardsley: Now, you say in the first period mentioned you worked as a warehouseman; then after March 1st, 1944 you were a packer and driver?

A. That is right.

Q. Did you change your occupation after that or have you been packer and driver continuously?

A. I have been that continuously.

Q. What sort of equipment did you drive?

A. I drive a semi.

Q. How long have you done that; since about what date? A. Well, I would say about a year.

Q. From about October, 1945?

A. That is about right.

Q. Prior to that what were you doing?

A. I was driving a bobtail.

Q. During what period were you doing that?

A. Pardon me?

Q. How long before October, 1945 were you driving the bobtail?

A. I was driving the bobtail from the time I started drawing 95 cents an hour.

Q. That is March 1st, 1944?

A. Yes. I was driving the bobtail until I started driving that semi.

(Testimony of Emory Key)

Q. Taking the first period, when you were a warehouse- [107] man, will you tell us just what your duties were, what you did?

A. My duties were to take care of furniture that was brought in to be stored.

Q. Was that crated or loose furniture or what?

A. Well, it was both.

Q. Some of it crated for shipment and some of it brought in without crates, is that correct?

A. That is right.

Q. Do you have any knowledge of what proportion, what percentage of the furniture was in shipment, in the course of shipment, and what percentage of it was just local storage? Do you know at all?

A. No. The only thing is, see, I take care of the warehouse. I mean I was only the helper. I was not a warehouseman. I only just worked there in the warehouse, and all I know is the stuff come in that had to be stored, we stored it, put it in storage, and the stuff that didn't have to be stored was crated in the other room as long as the crating room was there at Maple. It was crated and shipped, and where it went I don't know.

Q. That is the period from January 26th to March 1st. After March 1st until October, that is, March 1, 1944 until October, 1945, when you were driving the bobtail, you were packer and driver then? [108]

A. That is right.

Q. Just tell us what you did in that capacity?

A. Well, I would receive the orders that morning. Whatever material had to be used on the Navy job—it was all Navy, practically everything was Navy—and I received orders for how many barrels and how many

(Testimony of Emory Key)

boxes I needed. I would take my truck, load the material on, go out to the house, pack up all the stuff, load it into the truck and bring it back to the warehouse.

Q. Do you know what proportion of your time was spent in driving as distinguished from packing or loading and unloading?

A. Well, that is according to how far you had to go. For instance, if it was right around close to the warehouse, there wasn't very much time spent in driving. If it was farther out in town, Beverly Hills, something like that, there was more time spent driving.

Q. Is it possible for you to estimate the percentage you spent in each of those activities, driving and packing?

A. Well, I would say all day, going out on a packing job—of course, sometimes we would have three or four different packing jobs to go on—I would say all day, driving would be possibly, the driving part, would amount to two and a half hours or maybe three; the rest of it packing. [109]

* * * * *

Q. When you were operating, driving a semi—that is a semi-trailer, is that what that means?

A. Yes, sir.

Q. That was the period of the last year?

A. Yes, sir.

Q. Just describe your duties there.

A. The same duties.

Q. Were you packing? A. Yes, sir.

Q. Bringing goods into the warehouse?

A. Yes, sir. [110]

Q. Were you not driving between cities or on regular routes? A. No.

(Testimony of Emory Key)

Q. You were not?

A. Not between cities; no, sir.

Q. Well, were you what is called a line driver at any time?

A. No, sir.

Q. In other words, it is the same work you were doing before, only you are using a different type of truck, is that it?

A. Yes, sir.

Q. Was there some difference in the type of jobs that you used your semi on? Are they different from the type jobs you used the bobtail truck on, larger or smaller?

A. Well, the only thing is just more work on the semi. That is the only difference. They would hold more.

Q. Would they be bigger jobs, bigger shipments?

A. Bigger shipments; that is right.

Q. What would be the ratio between the driving time and the packing time on the bigger shipments?

A. Well, there is more packing on the bigger shipments than there is on the smaller shipments.

Q. So your percentage of packing time against driving time would be larger on the semi-trailer? [111]

A. That is right. It would be the packing; it would be more packing than it would driving. [112]

* * * * *

Cross Examination

By Mr. Moore:

Q. Mr. Key, your work from March, 1944 until October, 1945 remained fairly consistent, did it? [113]

A. Yes, sir.

Q. What percentage of the time would you estimate in the month of June, 1945, or, preferably, July, 1945,

(Testimony of Emory Key)

did you engage in packing and crating as compared with the time spent in driving?

A. What proportion would I say was packing?

Q. Yes; packing as compared with the time that you spent driving?

A. Well, I will say the biggest portion of it.

Q. The biggest portion is which?

A. I would say 75 per cent.

The Court: Packing?

The Witness: Packing and loading.

The Court: Yes. All right.

Q. By Mr. Moore: No. I mean just packing now, not loading.

A. You mean just packing barrels and boxes?

Q. Just packing barrels and boxes or packing anything.

A. "Packing" means packing into the truck, too, you know, because you have to take the stuff.

Q. I am not talking about loading anything into the trucks. I am talking about going into the house. The understanding I have of your definition is that you pack at the house of a person whose goods were being shipped.

A. That is right. [114]

Q. What percentage of your time did you spend in the month of July, 1945, in packing?

The Court: I suppose that he may refer to his records there and show, may he, counsel? Would not that be the best method for him to answer that question? Examine your records and take out the July statements.

Mr. Moore: No; I don't think there is any record in there of the classification of his duties.

The Witness: In June, 1944?

(Testimony of Emory Key)

The Court: 1945.

Mr. Moore: July, 1945.

The Witness: July, 1945.

Mr. Moore: There is no reference on the records.

The Court: Is there any reference on the records that would indicate that?

The Witness: Indicate how much packing I did?

The Court: Yes.

The Witness: No, sir.

The Court: All right. Answer the question, if you can. We have had no recess this afternoon, gentlemen. We will take a recess until 9:30 tomorrow morning.

(Whereupon, a recess was taken until 9:30 a. m., of the following day, Thursday, October 24, 1946.) [115]

* * * * *

The Court: You might make a statement now, gentlemen, so we have the record clear, on just where we are in the case.

* * * * *

Mr. Beardsley: Subject to the complete cross examination of this witness so that he will not have to return, counsel on each side have agreed that we will arrive at an average stipulated number of hours per week for which the overtime pay is to be paid during all of the time that each of the plaintiffs-employees are employed, subject, of course, to the determination as to whether or not they are entitled to receive such overtime pay. The purpose of that is to eliminate the requirement that we go into records and detailed proof man by man by all of the

(Testimony of Emory Key)

plaintiffs, showing exactly what hours were worked in each work week and what Saturdays were worked during each work week of the time each plaintiff was employed.

It is our belief that, by striking this average, a fair result will be arrived at for each side and a very large amount of the court's time will be saved. [118]

* * * * *

The number of hours we settled upon in this matter of arriving at an average was five and one-half hours per week per man for each week between the date of his beginning and ending employment.

Mr. Moore: Do you want to offer that now in the form of a brief stipulation?

Mr. Beardsley: Yes. That is, I will stipulate that is the settlement we are trying to arrive at and that your auditor is going to prepare a sheet which will show those amounts computed for that period of employment.

Mr. Moore: Will it be necessary to have a written stipulation?

Mr. Beardsley: Oh, yes; I think we should have a written stipulation setting forth the hours and amount for each man, which I think your auditor will be able to prepare. [119]

* * * * *

Does that correctly state our understanding, Mr. Moore?

Mr. Moore: Yes. Thank you, Mr. Beardsley.

The Court: It will be so understood.

Q. By Mr. Moore: Mr. Key, I believe our last question yesterday before we adjourned was an approximation by you of the time that you spent in doing various types

(Testimony of Emory Key)

of operation. As I recall, you mentioned 75 per cent for loading and packing. A. That is right.

Q. The last question—and I will ask you again this morning—is what per cent of your time you considered you did in loading?

A. Well, I would say about 20 per cent loading.

Q. That would include, also, loading and unloading?

A. That is right.

Q. What per cent of your time do you think that you spent driving?

A. Well, as I told you yesterday, it would be according to how far I drove, see. Say, for instance, if it was 10 miles out with a truck, it would be longer than if it was just right around close to the warehouse, which, as a rule, a lot of times we did get stuff right around the warehouse. So I [120] would say possibly 10 per cent driving would be close enough.

Q. 10 per cent driving? A. That is right.

Q. As a fair average, you mean, of your time?

A. Yes; that is right.

Q. What per cent of your time did you act as a driver's helper?

A. Well, I was not a driver's helper. I didn't ever get paid driver's helper's wages. I was classified as a "driver" from the time I left the warehouse, which was—I don't recall. Yesterday I had it right down.

Q. Disregarding the pay you received, in your operations did you ever act under the classification known as a driver's helper; in other words, somebody else drove the

(Testimony of Emory Key)

truck and you went along with him and you were then known as the driver's helper?

A. No; they didn't never classify me as a driver's helper, although I have went along and the other man drove the truck; but that was at all times, because there is always two men on the truck and both of them can drive.

Q. You both can drive? A. That is right.

Q. You consider yourselves both driving, or is the one who sits behind the wheel the driver and the one on the righthand side of the cab the driver's helper? [121]

A. Well, the one under the wheel is considered the driver.

Q. What does the driver's helper do to assist you when you are driving?

A. Well, it is according to if you have got a street that you don't know where it is at, he can take the guide, the Gillespie Guide, and look up the street and tell you, and save time getting to the place. He looks up the street and tells you right where the street is.

Q. If you are on a crowded street, directs you into parking the truck? A. I didn't get that.

Q. I say, if you are in a crowded street does he get out and help you in parking your truck?

A. That is right.

Q. Getting in and out? A. That is right.

Q. Does he keep a lookout at railroad crossings and places of hazard that you are passing?

A. That is right.

Q. Does he flag down traffic if you have to turn around on the highway and make a U-turn or have some

(Testimony of Emory Key)

other occasion to do something that requires holding up traffic? Does he assist you doing that?

A. Yes; if you should do that. You are not supposed to [122] turn around in the middle of a highway, anyway.

Q. Surely.

A. So I have never had that occasion.

Q. Does he put out flares when you have an accident or come to rest somewhere, and go back and watch the automobile traffic?

A. Well, I have never had that occasion. I have never had to have flares put out.

Q. Does he help you change tires when you have tire trouble? A. I never had any tire trouble.

Q. Does he ever help you in going for assistance when you need assistance? Say your truck has had a minor breakdown, does he go and get the help while you stay and guard the truck or vice versa?

A. Well, now, that—I have had a breakdown once or twice since I have been there, and that is just according. Maybe you are close to a station; you just go call the mechanic up. He always comes right out and fixes the truck.

Q. But one of you stays by the truck while the other goes and makes the call? A. That is right.

Q. Is that the procedure, or does the driver's helper do that and the driver stay with the truck?

A. No; the driver's helper would stay with the truck. [123]

Q. If you have any minor repairs to make on the truck so that you keep it running, the carburetor flooded or the battery terminal jar is loose, or anything that you

(Testimony of Emory Key)

consider a minor repair, does the driver and helper make those?

A. Well, we don't—well, I have never had occasion, myself, because the trucks are always in good shape. Otherwise they probably would not send them out. But I have never had any occasion to work on the truck.

Q. What per cent of your time would you estimate on the average that you spend packing?

A. Packing?

Q. Yes.

A. Well, I would say between 65 and 70 per cent.

Q. 65 and 70 per cent? A. That is right.

Q. What is that operation? When you speak of packing, packing 65 and 70 per cent, what do you mean by that term?

A. That is packing barrels, boxes, cartons, wardrobes, any kind of clothing or dishes, bric-a-brac, stemware, or miscellaneous stuff.

Q. Well, the fancy items that belong to the housewife, that she wants it carefully packed?

A. That is right.

Q. To move her to some other place. You put them in barrels and boxes, wrap them and give her little personal [124] attention and service those articles that you pack out at the household? A. That is right.

Q. Take your packing materials, stuffing or excelsior and the barrels out and do it right there?

A. That is right.

Q. What else do you do besides that in a packing operation? A. Besides packing?

(Testimony of Emory Key)

Q. I say, is there anything else to a packing operation besides that?

A. No; not household packing. That is all you do; you pack either barrels or boxes or cartons.

Q. Mr. Key, would you say that the month of July, 1945 was an average month's operation for you?

A. Well, I wouldn't say that. That I couldn't. I couldn't say that, because there is days that you work until 10:00 o'clock at night, and then maybe the next day you work until just 4.30. But I wouldn't be able to answer that question.

Q. To put it another way: Would the type of operation that you performed, such as your loading and packing and driving be fairly consistent throughout the months at the same average which you have given us, say, during the year 1945? [125]

A. Well, I wouldn't know that, either, because all I know is that a person, you just get your orders and you go to work, and whatever you have to do you do. And so I wouldn't know which month would make the most, because I didn't take care of that part of it, see.

Q. All right. Are there any months that you think that your operation which you describe to us would not approximate 20 per cent for loading and 10 per cent for driving and 65 or 70 per cent for packing in the year 1945?

A. No. I believe they would all go that far.

Q. Do you think in the month of July, 1945 that those averages would also hold true?

Mr. Beardsley: Just a moment. I object to that on the ground he has already been asked and has answered that he doesn't know how to answer that question.

(Testimony of Emory Key)

The Court: See if you can answer it any differently.

A. I have already said I couldn't tell you; so that is all I can say.

Q. By Mr. Moore: All right. Is there anything that you think of or that you recall now that might have been unusual in your operations during the month of July, 1945? A. Unusual?

Q. Yes. I mean was it a usual month, as you reflect over the month of July, 1945? Did you do about the same thing that month as you did in June or August of the same year? [126]

Mr. Beardsley: The same objection.

The Court: He has answered that twice, gentlemen.

A. I don't know.

The Court: Just a moment. He has answered that twice, counsel.

Q. By Mr. Moore: Is it your best recollection, Mr. Key, that the month of July was or was not an average month's work?

Mr. Beardsley: That is objected to. The same question in another form.

The Court: That is that same question, counsel. He has answered it several times.

Q. By Mr. Moore: Mr. Key, I show you waybill of the Coast Van Lines No. 5375; it bears date of 7-17-45; and ask you if that is your signature which appears at the bottom of the sheet?

A. No; it sure is not.

Q. Under the word "driver"?

A. That is right.

Q. That is not your signature?

A. That is right. That is not, either.

(Testimony of Emory Key)

Q. I show you No. 5378. I show you signature which appears to be the word "key" and ask you if that is your signature?

A. No; it is not my signature. It sure is not. [127]

Q. Is that not all put on there by you?

A. No; it is not.

Q. Do you know who put that on there?

A. No; I sure don't.

Q. Do you know the man named White who appears there in the next line? A. That is right.

Q. Do you recognize that?

The Court: He has not answered your question. Repeat the question.

(Question read by the reporter.)

The Court: Do you know the man?

The Witness: That is right.

The Court: Do you know him?

The Witness: Yes, sir.

The Court: Very well.

Q. By Mr. Moore: Do you know his signature?

A. No, sir.

Q. In the 17th or 16th day of July did you go to the Fidelity Van and Storage?

The Court: What year, what year?

Mr. Moore: Pardon me. 7-16-1945, appearing on this bill of lading, 1945, as indicated on the waybill 5378, to Fidelity Van and Storage, and pick up some material and carry it somewhere? [128]

A. Well, I will tell you now. This could be wrote on there, my name and White's name, easy enough, because I couldn't say whether I did or not. That is a long ways back. That is going a long ways back for me to remem-

(Testimony of Emory Key)

ber a certain place that I went to. So I couldn't say whether I did or not.

Q. You have no independent recollection of having done that on that day? A. That is right.

Q. Mr. Key, I show you a Coast Van Lines waybill No. 5493. Have you ever seen that document before? Any of your handwriting on it?

A. Yes; I believe this is my handwriting right here.

Q. Indicating the portion under "Van Service"?

A. Well, no. You got two, three barrels here packed.

Q. Is this your handwriting?

A. No. But that is the boss' handwriting. That is the dispatcher's handwriting.

Q. The portion which is your handwriting comes within the black line? A. That is right.

Q. Under the caption of "Van Service" consisting of many columns? A. That is right.

Q. Any other handwriting of yours on this document?

A. Yes. Right here is my handwriting. [129]

Q. Indicating what? Can you read that to us?

A. 2 barrels and 3 boxes; 30 pounds of shredded paper; 10 pounds of craft paper; and 20 pounds of news.

Q. All right. Do you recall the day of July 24, 1945, when you went to the Rosenberg home and picked up this order which is described here?

A. No, sir; I sure don't. I couldn't remember that, because I have had too many of these things. I couldn't remember that particular one.

Q. I will ask you if the information which you indicated was in your handwriting is correct information?

A. Now, listen. Let me explain something to you here. In this reading "9:30 to 10:30", that loading and

(Testimony of Emory Key)

this driving and all comes under the packing, too, because the company charges for packing extra. So that you can't go by that, not as far as loading is concerned, because all the company know that that goes in there, see, and you couldn't go by that loading time.

Q. I asked you if the item which says "loading time started 9:30-time complete 10:30" was put in there by you? A. That is right; it was.

Q. And then a further extension of time consumed or "time for computation of charges" one hour; the next column, "running time (round trip) 10:30"—what is that, 1:15 or 2:15? [130] A. "11:15."

Q. "11:15 one hour and one-half."

A. Well, that is doubled. You can see for yourself there from 10:30 to 11:15 is not an hour and a half. So that is double. You see, the company doubles all driving time. That is where your driving time comes in at.

Q. Yes. You had two men working, which you had here "No. of men" under this first column, is that right?

A. That is right.

Q. Now, "unloading 8:30"— A. Until 9:00.

Q. "Time started 8:30, time completed 9:00 o'clock" and extension "one-half hour"?

A. That is right.

Q. That is all in your handwriting?

A. That is right.

Q. Under the item farther down the page, I believe you stated that was all in your handwriting under the heading "materials"? A. That is right.

Q. What do the extensions beyond those represent, to the left of the writing, "2 barrels"?

A. Two barrels \$3.00.

(Testimony of Emory Key)

Q. What does that mean?

A. That means that is what they charged the customer [131] for two barrels, a dollar and a half apiece.

Q. That is just for the raw barrels?

A. That is just for the raw barrel; that is right.

Q. Two boxes?

A. Two boxes is—someone has changed that. It has been changed. I put it "\$2.00" and someone has made it \$4.50." So I don't know who has made it "4.50". That is not my writing.

Q. And the next one "30"—

A. Pounds of shredded paper "1.50".

Q. 20—

A. 10 pounds of craft. That is \$2.00. 20 pounds of news 1.20.

Q. What do you mean by 20 pounds of news?

A. That is shredded paper, cut newspaper.

Q. Then you have under the next heading "Material Sales Tax 2½%" and beneath that "crating and packing" and the figure "2". Is that your handwriting?

A. No; it is not. It sure isn't.

Q. Is the figure "crating and packing 2" and then the—

A. No, sir; none of this isn't my handwriting at all. None of that.

Q. And this extension beyond it is a different handwriting than this, is it?

A. This writing here and this. I believe, is the same.

Q. Indicating the line just referred to, which you did [132] not sign, and what other line?

A. This. See, I didn't sign that. I didn't sign that, and I don't think I signed that.

(Testimony of Emory Key)

Q. All right. A. It don't look like my writing.

Q. And this was not put in by you under the heading of the crating and packing "2 hours 1"?

A. I don't—I wouldn't say for sure on that.

Q. You do not recall, then, this occasion when you went to the Rosenberg place and did this particular job?

Mr. Beardsley: That is objected to as answered.

A. No; I sure don't.

Q. By Mr. Moore: And who signed your name here, do you know, the dispatcher or—

A. It must have been the dispatcher.

Q. Do you recall getting the signature of Mrs. Marie Rosenberg on there? A. No, sir; I sure don't.

Q. I show you Coast Van Lines waybill 5584, dated "7-25-45" and ask you if your signature appears upon the lower right-hand corner of this sheet

A. That is right. That is right.

Q. Under the heading "received payment Driver sign"? A. Yes; that is right.

Q. What does this say in here? Is that in your hand-[133] writing? A. "Cash"; that is right.

Q. "Cash"?

A. "Key". No. Received "cash and check". That was a certified check, I guess, because that is the way we usually put it. "Cash and check," you see, because a certified check is the same as cash.

Q. And then where your name as driver appears in the center of the bottom of the page that is not your signature? A. That is right; it sure isn't.

Q. On the 28th of July did you go to the home of Mrs. J. M. Ennis, or, rather, from the warehouse at 423

(Testimony of Emory Key)

East Third and take to 10530 Butterfield Road the merchandise which was the subject of that waybill?

A. I wouldn't know whether I did or not. It is my writing on here all right.

Q. Well, let us look at your writing under the heading of "Van Service"; the first item says: "loading No. of men 2." Is that your writing? A. That is right.

Q. The next item: "time started 8:30"?

A. "8:30."

Q. Is that your writing? A. That is right.

Q. "Time completed 11:00 o'clock"? [134]

A. That is right.

Q. Is that yours? A. That is right.

Q. "Time for computation of charges hours 2," is that yours?

A. No, sir; it sure isn't. From 8:30 until 11:00 is not two hours, so that is not my writing there.

Q. All right. You say—

A. That is not my writing.

Q. That is not your writing? A. That is right.

Q. Next column: "running time—time started 11:00" is that your writing?

A. I am not sure whether it is or not.

Q. "Time completed 12:30," is that your writing?

A. I don't believe it is. I wouldn't say for sure, but I don't believe it is.

Q. Your helper. Mr. White, is it his writing?

A. I don't know.

Q. You are not familiar with his handwriting?

A. Well, not familiar enough to know whether it is his writing or not.

(Testimony of Emory Key)

Q. "Unloading time-started 12:30-time completed 2:30" is that your handwriting?

A. Well, it has been gone over there so I can't tell.
[135] Someone has gone over it. You can see that.

Q. All right. Next column: "time for computation of charges 2½ hours," is that your writing?

A. I don't believe so.

Q. I will ask you, from an examination of that document, what time did you spend packing or crating on this particular shipment?

A. Well, there is no packing time on this. Well, this was crated. This was all uncrated. We spent, you might say, the whole day uncrating this stuff. This was crated, I am pretty sure.

Q. Does it indicate on the waybill what you did?

A. No, it doesn't indicate, but it indicates, whenever you collect \$249.42 there has got to be something around the furniture.

Q. It came out of the warehouse?

A. That is right. It probably came through from a full car. I wouldn't say because I don't know.

Q. When you do a packing or uncrating job do you have a designation for that on the waybill?

A. No; they don't put that down. They just count it. They charge, but they just count it "unloading."

Q. Oh, I see, "unloading."

The Court: These should all be marked for identification. Every time a witness is testifying from a document, mark it, [136] Mr. Cross.

The Clerk: Yes, your Honor.

The Court: Later, gather up the others, Mr. Moore, and have them marked.

(Testimony of Emory Key)

The Clerk: This will be Defendant's Exhibit A for identification.

Mr. Beardsley: The number of that?

Mr. Moore: May we have this all as part of one exhibit, your Honor?

The Court: Yes.

Mr. Beardsley: Are you going to have it numbered and read?

The Clerk: This is "LA. 4485" and then underneath it in red crayon it has "5402."

The next one will be Defendant's Exhibit B for identification.

The Court: No; they are going to mark them just under the same exhibit, Mr. Cross, and mark them then with 1, 2, 3.

The Clerk: Yes, your Honor. This one I have in my hand will be A-2. The preceding one will be A-1.

Mr. Beardsley: What was the number on Exhibit A-2, Mr. Cross, please?

Mr. Cross: A-2 is marked "LA. 5493."

Mr. Beardsley: Thank you.

Q. By Mr. Moore: I show you Coast Van Lines waybill No. 5574 and ask you if any of your handwriting appears upon [137] that document? A. Yes, sir.

Q. Under the heading "Van Service"?

A. That is right. This, and this, and this, and this, and this.

Mr. Moore: The witness indicating that under the heading of "No. of men," "2," "time started 1:00" o'clock—is that? A. That is right.

Q. "Time completed 3:00" o'clock; "time for computation of charges" "2 hours"; "running time," "time

(Testimony of Emory Key)

started 3:00"; "time completed 3:45"; "1½ hours"; "computation of charges hours and minutes."

The Witness: Do you call it from 3:00 until 3:45 one hour and a half driving?

Mr. Moore: Mr. Key, I am just trying to identify certain portions of the exhibit.

The Witness: That is right, but that don't show. That shows double. In other words, you are making my driving time an hour and a half here when it was only 45 minutes.

Mr. Moore: I am not trying to draw any significance from these documents. That is for the court to do. I am trying to identify these as having been either seen or handled by you at sometime previously, and let the deduction be drawn. If there is any explanation you would like to make about them, I am sure that you can make it. [138]

Q. Do you have any explanation about it? If so, give it to the court now on this item.

A. Well, the driving time is what we were talking about a while ago, wasn't it? Okay. From 3:00 until 3:45 is three-quarters of an hour, isn't it?

Q. That is right.

A. Well, you see, in other words, on this bill here it charges driving time one hour and a half.

Q. Under the item "running time (round trip)"?

A. That is right. But that is not a round trip. It is just one way.

Q. But when you figure both ways, then it is an hour and a half; is that the significance of that?

A. That is right.

(Testimony of Emory Key)

Q. I see. So that your running time is listed as single time and then the extension on that indicates the hours spent by reason of a round trip, is that correct?

A. That is right.

Q. Any other writing of yours on this document?

A. I don't think so.

Q. Well, on the 26th day of July, 1944, did you go to the home of Louis Kanir, 2027 Dunsmuir Avenue, Los Angeles, and pick up five rooms of personal effects?

A. I did.

Q. Do you remember that? [139] A. Yes.

Q. Under your operation that day on this particular job, can you tell us from this waybill what packing you did on that occasion?

A. There wasn't any packing on that occasion at all; no packing.

Q. What did you do, merely driving and loading and unloading? A. That is right.

Q. I show you 5099, Coast Van Lines waybill.

The Clerk: Do you wish this marked?

Mr. Moore: Please, Mr. Clerk.

The Clerk: Defendant's Exhibit A-3 for identification.

Mr. Beardsley: No. 5574?

The Clerk: That is right.

Q. Mr. Moore: Any of your writing on that document, 5099? A. That is right.

Q. Is there or is there not? A. There is.

Q. And which portions are in your handwriting?

A. This right here.

(Testimony of Emory Key)

Q. Indicating under "Van Service," "time started 2:00" is yours?

A. Yes. Don't forget that is packing and loading. You [140] see three barrels here and five boxes, but don't forget that that is packing three barrels and five boxes and loading it from 2:00 o'clock until 5:00.

Q. All right. Directing your attention to the item "packing and crating" is that your writing, "2 hours"?

A. No, sir; it sure isn't. This is.

Q. Is all of this writing in the space under "Van Service" your writing?

A. No; this isn't, and this isn't, and this isn't, and this isn't.

Q. In other words, the extensions under the column "time for computation of charges-hours and minutes" is not yours, but the balance in the box is?

A. This is mine. That "3" I think is mine.

The Court: When you say "this" the record does not show what you are referring to.

Mr. Moore: The witness has just referred now to the first item under "time for computation of charges-hours and minutes" and the extension of "loading 3 hours." You state that is your writing? A. That is right.

Q. And the item beneath that, "running time (round trip) 2 hours" is not your writing; nor is the extension under "unloading 1½ hours" your writing?

A. No, sir; neither one of them. [141]

Q. But the "time started," the "time completed" for the "loading," "running time" and "unloading" are yours, in your handwriting?

A. The "time started" and the "time completed"; that is right; that is mine. And the "running time," the

(Testimony of Emory Key)

"time started," and "time completed" is my handwriting. The rest of them isn't.

Q. The unloading time is not yours?

A. No, sir.

Q. Do you remember a shipment which you picked up from C. G. Duffy on the 12th day of March, 1945 at 1217 South Monterey Street, Alhambra, which consisted of six rooms to be taken to storage? Do you remember doing that job?

A. No; I sure don't. I don't remember it.

Q. Is the hours of time spent in crating and packing as shown as "2" in that particular job correct or incorrect?

Mr. Beardsley: Well, that is objected to. He has testified that he does not remember the job. I do not see how he can answer the question whether the entries are correct if he does not remember the job.

Mr. Moore: I will withdraw the question.

Q. Is it your best recollection that is not your writing of the house consumed in the packing or crating?

A. I just don't know. That is the way I will say it.

Q. You have no recollection, or, rather, I should say, from an examination of this waybill can you determine if you did [142] any packing, other than driving and loading on that job?

A. Can I determine if I did any packing?

Q. From an examination of this waybill.

A. Well, sure. Right here "materials" it shows what was packed and what was not packed. Four barrels, three boxes and 80 pounds of cut paper, 10 pounds of craft, and 20 pounds of news.

(Testimony of Emory Key)

Q. All right. And then the item which follows that: "hours for packing or crating," you did not fill that out?

A. No; I don't think I did. I wouldn't say for sure. I don't know.

The Clerk: The next for identification is Defendant's Exhibit A-4.

Mr. Beardsley: That is No. 5099?

The Clerk: 5099.

Q. By Mr. Moore: I will show you Coast Van Lines waybill No. 4973 and ask you if you have seen this document before?

A. I couldn't say. I don't know because I haven't got a signature or anything on there of mine.

Q. Any handwriting on this yours?

A. No, there sure isn't, not that I see. No.

The Court: All right; proceed with the next question.

Q. By Mr. Moore: I show you Coast Van Lines waybill 5064 and ask you if on the 27th day of July, 1945 you went to the Bekin's Grand Avenue Storage and got 9,500 pounds and [143] delivered it to Commander George Nickel?

A. I don't remember.

Q. I show you Coast Van Lines waybill 5311 and ask you if you have ever seen that document before?

A. No. I just don't remember it, that is all.

Q. Did you ever drive to San Diego, Mr. Key, for the Coast Van Lines?

A. Yes; I drove to San Diego one time.

Q. Does this document refresh your recollection whether that was the trip you made to San Diego?

A. No; it sure doesn't. No; it sure doesn't.

(Testimony of Emory Key)

Q. Where the words "Key" is placed under "pickup and delivery" neither of those are your signatures?

A. No.

Q. I show you Coast Van Lines waybill 4383 and ask you—

Mr. Beardsley: Is that 4383? I am sorry.

Mr. Moore: 4383.

Q. —and ask you if you have ever seen this document before? Let me ask you: is that your signature that appears in the lower right-hand corner?

A. That is right.

Q. Did you place that signature upon that document?

A. That is right.

Q. I ask you if on June 9, 1945 you went to the Margo [144] Warehouse and picked up Job No. 2120 and delivered it to B. J. Wright, 3864 Holly Park Place, Atwater or Glendale, California?

A. Yes; I did, I guess, because it looks like my handwriting there.

Q. What packing or crating did you do in connection with that job?

The Court: Can you answer the question? We are wasting a lot of time.

Mr. Moore: Pardon me. I did not think the witness answered the question.

The Court: No; he has not. I asked the witness to answer it.

A. Well, I don't know whether there is any packing on it or not.

The Court: All right; all right.

A. I don't know.

(Testimony of Emory Key)

Q. By Mr. Moore: I will ask you if you made any entry on this document indicating that you did any packing or crating? A. No.

The Clerk: Defendant's Exhibit A-5 for identification. That is No. 4383.

Q. By Mr. Moore: I show you a Coast Van Lines waybill 5606, dated the 26th day of July, 1945, and ask you if you have ever seen this document before, or is this your signature? [145] A. That is right.

Q. That appears in the lower right-hand corner?

A. It is.

Q. Any other writing upon this page yours?

A. Yes; this is.

Q. Indicating the notations under "Van Service," including that "loading," "running time," and "unloading"?

A. Yes.

Q. Is there any indication on this document that you did any packing in connection with this service?

A. No.

Q. I show you 4971, Coast Van Lines waybill.

The Clerk: May I mark this, please?

Mr. Moore: Please.

The Clerk: This next exhibit will be Defendant's Exhibit A-6, No. 5606.

A. I don't remember that one.

Mr. Moore: Pardon me. Mr. Reporter, the last question I have of the witness was whether he had ever seen the waybill.

Q. I will ask if you have ever seen this document before? Withdraw that. Is there any of your writing upon this document? A. No.

(Testimony of Emory Key)

Q. Where the words "Key" is placed under "pickup and delivery" neither of those are your signatures?

A. No.

Q. I show you Coast Van Lines waybill 4383 and ask you—

Mr. Beardsley: Is that 4383? I am sorry.

Mr. Moore: 4383.

Q. —and ask you if you have ever seen this document before? Let me ask you: is that your signature that appears in the lower right-hand corner?

A. That is right.

Q. Did you place that signature upon that document?

A. That is right.

Q. I ask you if on June 9, 1945 you went to the Margo [144] Warehouse and picked up Job No. 2120 and delivered it to B. J. Wright, 3864 Holly Park Place, Atwater or Glendale, California?

A. Yes; I did, I guess, because it looks like my handwriting there.

Q. What packing or crating did you do in connection with that job?

The Court: Can you answer the question? We are wasting a lot of time.

Mr. Moore: Pardon me. I did not think the witness answered the question.

The Court: No; he has not. I asked the witness to answer it.

A. Well, I don't know whether there is any packing on it or not.

The Court: All right; all right.

A. I don't know.

(Testimony of Emory Key)

Q. By Mr. Moore: I will ask you if you made any entry on this document indicating that you did any packing or crating? A. No.

The Clerk: Defendant's Exhibit A-5 for identification. That is No. 4383.

Q. By Mr. Moore: I show you a Coast Van Lines waybill 5606, dated the 26th day of July, 1945, and ask you if you have ever seen this document before, or is this your signature? [145] A. That is right.

Q. That appears in the lower right-hand corner?

A. It is.

Q. Any other writing upon this page yours?

A. Yes; this is.

Q. Indicating the notations under "Van Service," including that "loading," "running time," and "unloading"?

A. Yes.

Q. Is there any indication on this document that you did any packing in connection with this service?

A. No.

Q. I show you 4971, Coast Van Lines waybill.

The Clerk: May I mark this, please?

Mr. Moore: Please.

The Clerk: This next exhibit will be Defendant's Exhibit A-6, No. 5606.

A. I don't remember that one.

Mr. Moore: Pardon me. Mr. Reporter, the last question I have of the witness was whether he had ever seen the waybill.

Q. I will ask if you have ever seen this document before? Withdraw that. Is there any of your writing upon this document? A. No.

(Testimony of Emory Key)

Q. Did you on the 29th of June take from the Margo Street warehouse of the goods in storage and deliver them to 626 South Spring Street for Holmes and Mower? [146]

A. I don't know whether I did or not.

Q. I show you Coast Van Lines waybill No. 5540 and ask you if any of the writing on that document is yours?

A. Yes.

Q. Does your signature appear anywhere on that document? A. No; it does not.

Q. I will ask you if, in accordance with the information appearing upon this waybill, you recall performing any of the services rendered? Withdraw the question.

The Court: Put a new question, counsel.

Q. By Mr. Moore: What portions are in your writing? A. This right here.

Q. Indicating under "Van Service"?

A. "Packing," "packing."

Q. The word "packing" written in the space where the word "loading" is printed?

A. That is right. "Packing and loading 10:30 to 2:30." That is my writing.

Q. "Number of men" is not yours?

A. Yes; I think that is mine, too.

Q. All right. A. I am not sure.

Q. Anything else on there in your writing?

A. Yes. This is mine down here.

Q. Indicating under the "materials used"? [147]

A. Yes.

(Testimony of Emory Key)

Q. And it is not your writing under the heading of "packing" "2" pounds or "hours 4"?

A. I am not sure about that. I couldn't say, because I am not sure about it.

Q. Do you have any independent recollection of having gone to the home of Commander Booth, 2578 New York Drive, Altadena and bringing to storage the household effects?

A. I sure don't.

Mr. Moore: Does your Honor consider that this has had sufficient identification?

The Clerk: This document, No. LA. 5540 is Defendant's Exhibit A-7 for identification.

Mr. Moore: In order to save the court's time, may we reserve the right for further cross examination of the plaintiff Key and proceed with other matters at this time in the interest of saving some time?

The Court: Satisfactory.

Mr. Beardsley: Step down, Mr. Key. Do you want Mr. Key to remain in the court room the rest of today, Mr. Moore?

Mr. Moore: No, subject to call.

I understand your Honor is ruling at this time that we will proceed with the service institution showing as defendant's proof out of order?

The Court: Satisfactory. [148]

Mr. Moore: I will call as our first witness Mr. Cummins.

JAMES CUMMINS,

called as a witness by the defendant, being first sworn,
was examined and testified as follows:

The Clerk: Your full name?

The Witness: James Cummins.

The Clerk: Will you spell your last name?

The Witness: C-u-m-m-i-n-s.

Direct Examination

By Mr. Moore:

Q. What is your present address, Mr. Cummins?

A. 1234 Thirteenth Avenue, San Francisco.

Q. Are you connected with the Coast Van Lines, Inc.?

A. Yes; I am, in the capacity of secretary of the corporation.

Q. Is that a California corporation?

A. Yes; it is.

Q. Do you have anything to do with the management of the Coast Van Lines' business? A. Yes.

Q. To what extent are you familiar with the operation of the Coast Van Lines?

A. On an over-all phase of it I am familiar with the [149] financial setup, the sales phase of it, partly with the operations. I am not an expert on them, but I have an idea of the over-all status of the company, possibly, from the sales angle I would be more expert to testify on.

Q. How much of your time do you spend in the business of Coast Van Lines?

A. Oh, to put it down in hours it would be difficult to say. I would say I spend a goodly portion of my time. If I am not working at it in Los Angeles, I devote quite a bit of my time in San Francisco to it.

(Testimony of James Cummins)

Q. Do you have an office of Coast Van Lines in San Francisco? A. Yes; we do have.

Q. Would you say you spend a substantial portion of your time in Los Angeles in connection with the business of Coast Van Lines or estimate the time?

A. You might figure maybe 50-50.

Q. Would you state to the court what the nature of the operations of the Coast Van Lines is in relation to the consumer picture?

Mr. Beardsley: May we have the time fixed? I do not believe the witness has stated when he first became affiliated with the company. Will you fix the time about which he is going to testify?

Q. By Mr. Moore: Before answering the question, Mr. [150] Cummins, when did you become affiliated with Coast Van Lines?

A. Some date in October, 1944. That was where we took in ownership of the company.

Q. And have been since that time?

A. Since that time. If I might mention, for a period of that time we represented the company for a period of four years, to my knowledge, in San Francisco.

The Court: You devote all your time, do you, to the defendant, Coast Van Lines?

The Witness: No, your Honor; about half my time.

The Court: All right, proceed.

Mr. Moore: Would you read the last question, Mr. Reporter?

(Pending question read by the reporter.)

(Testimony of James Cummins)

The Court: What does it do? What is its business? That is the question.

A. Well, our business is almost exclusively devoted to time spent or creating business for people, for individuals, and moving of their household goods and storing of their household goods, the packing and crating of their goods going to any place, going overseas. The work that we do incidental to doing the job—there is quite a lot of preliminary work in connection with it—from a sales standpoint we go out to a house and talk to a lady concerning her over-all move. She will tell us—

Q. By Mr. Moore: That is what the estimator is called. [151] Is that what Mr. Retzer referred to yesterday?

A. Yes. You could go out in the capacity of an estimator, a salesman or a service man. It is customary on many jobs that we will go to a residence and talk to a lady about her move. One person may have some particular piece of china that may have an extreme value, that they usually want to be particularly taken care of. Another person may have painting that she would ask your advice as to whether they should be crated and properly protected before they are moved in a van. Sometimes a lady may have furniture she may desire to sell or would not want to move it, and rather than go to the expense of crating it we tell her what she may get for it. We tell her what it would cost her if she went to ship it, for instance, to New York or to San Francisco, a heavy base.

We go further than that; we advise people regarding the utility disconnections, the milk man or stove man to disconnect her stove.

(Testimony of James Cummins)

You take a lady with a modern radio, ordinarily she would just move it. She is unaware of the fact that this arm that is on it would have to be properly crated before it is moved. We would recommend to her a radio man.

If she is, for instance, being transferred overseas, which a lot of them are today and have been in the past prior to the war, of course, if she has rugs and woolen goods that she is not going to use, we recommend that she have her rugs cleaned, [152] sterilized and moth-treated. Also, her upholstered furniture.

We tell her, further, if she is not going to use them—we will say she is going to Guam or to Honolulu—we tell her, if she puts them in her basement and not being used, they should be re-treated at the end of six months.

Q. What is this wardrobe that Mr. Retzer referred to yesterday?

A. A lot of people are not aware of this wardrobe service despite the fact it has been in service, I think, for 20 years. A wardrobe is a big box. It saves the lady from putting her clothes into a trunk and pressing them tightly together and having them all wrinkled. We give them a wardrobe service, where you put the wardrobe right in front of the closet and it is carried to the destination in that wardrobe, and the clothes are hanging just like they were in her clothes closet. Sometimes they get squeezed in a little tight and they will get wrinkled in spite of our assurance to the lady that she will get good

(Testimony of James Cummins)

care taken of them. And that goes on almost every moving job.

Q. What is your service in connection with storage of household effects?

A. Well, in connection with your storage, a lady decides to move. It may be a divorce in the family or a death in the family, or she may decide to move to Florida for the summer or the winter, and she wants to store her goods and she asks [153] us about our services. We tell her, again, about moth-treating, if they are going to be in for sometime and—

Q. I am now speaking about the storage service, that is, taking the household goods and putting them into your warehouse for indefinite storage or fixed period of storage.

A. You want the detail of the operation?

Q. Not out at the house, but what do you do with the goods when you take the goods?

A. Well, we bring the goods into storage and as soon as our truck backs up to the platform, the goods are taken off and made a check of, listed by the warehouseman or the warehouse foreman or the checker. Then they are put by the elevator door and placed in the elevator and taken upstairs. Each individual piece has a tag on it.

I might digress for a minute by saying if some of this be upholstered pieces and were to be moth-treated, wrap-

(Testimony of James Cummins)

ped or cleaned, we would arrange with a cleaner to have them cleaned for her and ultimately brought back into the warehouse and put in with her lot. We will say that we store them on the fourth floor. It goes up there and the warehouseman examines the furniture. If there is any damage, he will call the attention of the checker to it if the checker did not catch it when it was coming in, to take an exception to it. Then it is wrapped with paper. The upholstered pieces that we retain are covered with paraffin and sometimes sprayed, and then they are wrapped [154] in a craft paper. The rugs, if they are not cleaned by an outside cleaner, we wipe them off, cover them completely with paraffin and cover them heavily with a particular kind of paper and put them into a pool. It is piled and cubed, as we refer to the measurement, and the billing sent to the lady.

If the storage is in for a period of several years, it is good warehouse practice at the end of a year to notify her that her goods have been in storage and that, for the protection of them, they should be cleaned, and again they should be re-treated with naphthalene.

Q. When the end of the period comes what is usually the situation if a person has left their goods there? What do you do?

A. I might mention another important phase of that while it is in storage, that the lady may be in Boston and she will write to us and tell us to send her—well, we will

(Testimony of James Cummins)

say an easy chair. We will go into the lot and dig it out and ship it to her. She may designate her sister to go into a second drawer of a bureau and take out a pair of nylons that she thinks she has in there, or she gives a letter of authority to her friend to come in. The warehouseman arranges for access and it is taken out and sent to her. At the end of the time we send her a bill each month for storage. If the lot is to go out, we will say, she wants it delivered in San Francisco, well, we haul it on our own trucks up to San Francisco or down to [155] San Diego; or if she is going to live locally in Los Angeles, she may decide she wants to sell out. We arrange for an auctioneer to come in and give her an estimate of it. We may have some friendly connection in the furniture business and may do better in price. We will tell the friend of ours in the furniture business to come in and bid on it, that with the intent of getting her a little better price if she has, for instance, a combination radio, particularly in the last five years—

Q. Mr. Cummins, just let me ask you, can you give us a little more in detail what is done with goods from the time the person orders them out of storage until they are delivered, say, on Wilshire Boulevard to Apartment A of 9237?

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p. m. of the same day, Thursday, October 24, 1946.) [156]

Los Angeles, California, Thursday, October 24, 1947,
2:00 P. M.

The Court: Proceed, gentlemen, Mr. Moore. Mr. Cummins, take the stand.

JAMES CUMMINS (Recalled)

Direct Examination (Resumed)

Mr. Moore: Will you read the last question, Mr. Reporter?

(Question read by the reporter.)

Q. In other words, can you take a hypothetical case, Mr. Cummins, and trace when you get an order to take something out of storage? What do you do for the customer?

A. Generally, the customer comes to the office and signs her copy of the warehouse receipt. I might possibly go back a little bit and tell you just what is a warehouse receipt.

The Court: Oh, I think we understand that. Just proceed with the actual work.

A. The order is given to our dispatching office to deliver this lot on Wilshire Boulevard. Word is passed to the warehouse foreman who has to get the lot ready to go out. The instructions are, if there is naphthalene on the rugs, they should be wiped off; the chesterfield is to be brushed off if there is any dust on it. The furniture should be rubbed down. It is placed on a truck and delivered out to a resi- [157] dence. If there are any particular items in that lot that would call for special attention, for instance, a valuable painting that may be in a crate, the dispatcher will in turn notify the truck operator that he has a \$50,000 picture on there, to be extra careful

(Testimony of James Cummins)

with it in the handling of it. It is not uncommon in some cases where, depending on the nature of the job, how big it was, if our services were needed, to further go out and help the lady in putting these things up or hanging her drapes.

Q. By Mr. Moore: Now, when the merchandise gets from the warehouse to the designated destination what takes place then?

A. When it gets to destination what happens?

Q. Yes. What is the service, what is the operation of your company?

A. Well, the first thing would be done, the rugs would be taken off first and be laid in their respective rooms.

Q. At the direction of the householder?

A. At the direction of the householder. Sometimes a driver will suggest to a lady that this rug is too big in this room and we will put it in the next room. The rug pad goes first and then goes the rug.

Q. Then what?

A. They would then take whichever is next on the van, possibly the living room, and take the living room furniture [158] and place it as it goes. She may decide to put it by a window, or maybe the driver, if he is on his toes, will make a suggestion.

Q. They put it wherever the person designates the articles to go?

A. Anywhere the lady tells them to put it, they will put it. After it is left, many times she changes her mind and will ask to put it some place else and they will do that for her.

(Testimony of James Cummins)

Q. All right.

A. The next thing, since the living room is in or the bedroom, whatever they worked on, the kitchen will come, and then the boxes that were packed in storage, if the boxes are designated to contain kitchenware, those boxes would go in the kitchen. If it is designated to contain mirrors—

Q. Do they open those boxes? A. Pardon me.

Q. Do they open those barrels and boxes that are delivered as boxes and barrels, or what do they do with them?

A. They take these boxes, put them in their respective places. If the lady wants to have them unpacked, we will unpack them for her. Invariably, if she is a lady of means, she would have our packer unpack back there the next day to unload these barrels and boxes, hang up the mirrors and hang the drapes for her; in other words, arrange that furniture [159] just exactly as she wants it to be and do the complete unpacking.

Q. One other thing: suppose a person is moving from San Francisco to Los Angeles, what is the nature of the transportation service or the operation of your firm in that type?

A. Well, we get an order to move from San Francisco to Los Angeles; we arrange with the Los Angeles office that they will tell us when the trucks are going to be in San Francisco. At that point we will go out—I may go out personally, myself, and I have on many, many an occasion, to the house. We will talk to the lady, look over what she has. First thing we will talk to her about possibly is in regard to the insurance and the necessity of carrying insurance to protect her prized belongings. We

(Testimony of James Cummins)

will tell her of the two or three different forms of insurance that there are, full coverage, basic coverage, and the all-risk policy. We tell her the value of all-risk compared with the basic coverage.

She will want to have certain items packed. As I mentioned previously, she may have some valuables that we could not trust in an open van or in a closed van, or that we might crate a mirror, or she might have some special item that would need a special service; and we would do that at her house. Then we would bring our Los Angeles truck in there, load it and bring it down to destination.

Q. Now, is that only just small, special articles you would crate in a van shipment from San Francisco to Los Angeles? [160] Is that as I understand you?

A. Well, sometimes you would not crate anything. But in many cases, if there were something of very extreme value, or a real intrinsic value that the lady prized particularly, she would be willing to pay insuring against damage, possibly, or the safety of traveling for that particular article. That was her prized possession; she was more concerned about that than she was about anything.

I might mention at this point, in a typical move, that while we may speak of a big job, moved by a wealthy person, we go out to the most humble home and move them to Los Angeles and they are just as concerned about their modest type of furniture that they have as the lady that has the big voluminous home. And if the lady with the modest home is damaged, she will scream just as loud as the lady who has the big home.

The Court: That may be stricken.

Mr. Moore: All right.

(Testimony of James Cummins)

Q. You get the order and the woman is ready to move. What do you do now?

A. Load the furniture on to the van.

Q. Then what do you do?

A. It is transported to Los Angeles.

Q. Does it go directly from the house to Los Angeles, or does it go to an assembly point where other merchandise is picked up? Just describe, as closely as you can, what happens [161] to that furniture from the time it leaves until the time it arrives at its destination.

A. Either of two or three things could happen to it. If she is going to a house as large as she was moving from, invariably the entire furnishings would go to her house. If she was going to a smaller house, we would put part of it in storage and hold it there for her.

Q. Well, if you put that in storage, then the other merchandise goes in the house, and what is the next order in sequence of operations?

A. In some cases the van may have some other lot on there that is coming into storage. We would put the stuff into storage at that time. In another instance, they could go out to the house and she will decide what pieces she will keep, and bring the balance of them into storage, those she doesn't want to keep there.

Then, as I said, the unpacking service. If she so desired our man to come out the following day, he would come out there and unpack it. On the other hand, the driver that is on that particular truck, if she just has an inconsequential amount of packing, say, three or four barrels, he will do the unpacking at that time for her, quite often putting away the furniture.

(Testimony of James Cummins)

Q. Who unloads it? What is done now when it arrives at the house, if you can just visualize that, please? [162]

The Court: Counsel, do we have to have that testimony? If goods are delivered to a house, I am going to assume that they are unloaded and put in the house and unpacked. I don't know what else you could bring out. I assume they are not left in the street.

Mr. Moore: It is just who does it, your Honor.

The Court: Well, his employees do it. Who else would do it? A great deal of this talking about bringing a package to the warehouse and then putting it in the warehouse and then putting it in a certain place, that to me is unnecessary. I think the court knows all about those things. All right, ask the next question.

Mr. Moore: That is all, Mr. Cummins.

The Court: Wait a minute, wait a minute.

The Witness: Oh, excuse me.

Q. By Mr. Beardsley: Mr. Cummins, your company does not now have the Navy contract, does it?

A. No, sir.

Mr. Beardsley: That is all.

The Court: That is all. When was the Navy contract terminated?

Mr. Moore: June 30, 1946. I think that another witness will be asked those questions.

The Court: All right. [163]

TWYMAN R. BRAMMER,

called as a witness by the defendant, being first sworn,
was examined and testified as follows:

The Clerk: Your full name?

The Witness: Twyman R. Brammer.

Direct Examination

By Mr. Moore:

Q. Mr. Brammer, you are in the employ of the Navy Department? A. Yes, sir.

Q. And what is your capacity with the Navy?

A. Senior inspector of packing and crating.

Q. Your office is at the Naval headquarters in San Pedro?

A. San Pedro or the foot of Twenty Second Street.

Q. Do you have certain official documents of the Navy, which are the prescribed rules and regulations known as "The Navy Manual"?

A. Yes; I have with me The Bureau of Supplies and Accounts Manual which governs shipments.

Q. Does that contain the regulations which apply to Navy personnel? A. It does.

Mr. Moore: Your Honor, at this time there are certain sections from this that we would like to have or offer into [164] evidence. There is one problem: This man says that the Navy Department prefers not to leave this manual in court. I told him we could return it to him at the end of the trial, or whatever fashion the court deems advisable to get these official documents before the court, and accommodate the Navy Department by returning them, if that is satisfactory to the court and counsel.

(Testimony of Twyman R. Brammer)

The Court: Just pick out the sections that you think are material to the case and we will pass on them as we reach them.

Q. By Mr. Moore: The manual which you have before you contains Sections 1870.2, 1870.11, 1873, 1874.1 (c), 1875.7, 1877.1.2? A. Right; it does.

Mr. Moore: At this time we would like to offer into evidence these Navy regulations from this Navy manual.

Mr. Beardsley: We object to them on the ground there is no foundation laid, in the first place, to identify the terms of the Navy contract to know whether it refers to these or not. There is nothing so far in the testimony which would constitute a foundation for introduction of these general regulations on Navy personnel.

The Court: I do not know what they apply to yet. Read 1870.1 and I will try and see what that is.

The Witness: 1870.2, I believe it is.

“Household effects are the personal belongings and [165] household effects which are exclusively the property of the person ordered to make the change of station and which have been in use by such person or his family previous to shipment thereof and which are subject to uniform freight rates.”

The Court: Counsel, I am not clear that I understand. For instance, what is the pertinency of this particular section? We all know what household effects are.

Mr. Moore: The pertinency of this and the other sections in connection with it is in line with the part we gave yesterday. In other words, this indicates that these are the individual effects and the individual moves of the Navy personnel as distinguished from the claim of counsel

(Testimony of Twyman R. Brammer)

for the plaintiffs, I believe, that we are engaged in some industrial enterprise by moving the individual effects or household goods. In other words, in the Lonas case the test there was the question of whether or not a personal service rendered, whether it be to a hotel, just customers who use the towels, or whether it be to other institutions, as long as the ultimate purpose or use was for the individual person and that the service was rendered to the individual person. That is the test that we have in this case, and it is not in the sense of moving, let us say, all the furniture out of this court room for the Government. It is merely an agency of the Government; it is merely an individual move of people who are entitled to it, as these [166] regulations will show. They must have it the same as their—I mean they are entitled to have the attention or they are entitled to have their pay. This is merely an accommodation. In effect the law has been changed and in effect next month, which makes it a direct move without going to the accounting office of the Navy or War Department and then submitting vouchers for it.

We also have the regulation here which provides that the Navy man can in turn move his goods at his own expense and submit the voucher in accordance with his right to have certain pounds moved; and the regulation provides that if he ships over the weight, it becomes his personal responsibility to pay for any overage.

It also provides that he has a claim for any damage which is shown. It is not a Government responsibility or a Government claim. If his goods are damaged in transit, it remains his claim and his property.

The Court: I understood that this was a contract between the defendant, a corporation, and the Navy, and

(Testimony of Twyman R. Brammer)

not a contract between this corporation and the individual serviceman in the Navy.

Mr. Moore: That is true, but it is for the individual service of the Navy man.

Mr. Beardsley: If the court please, I would add to the grounds of my objection, not only that no proper foundation [167] has been laid because the contract has not been presented to see whether it in any way refers to these regulations, but also that this point is not material. We do not dispute that the household goods were owned by the individual. That is what the section Mr. Brammer has read discusses. That is right. That is not an issue in this case, who owned the goods. We set forth that they were goods owned by the individual Navy personnel, but they were moved under a general contract. The Navy, as I understand it, accepted bids from various people in the moving business, and some one particular mover contracted with the Navy to do all this work in this area under a Navy contract.

These regulations do not bear upon that issue at all, and what the Navy definition defines as goods of the individual, or what the Navy says about his right to recover for the loss of his own goods—which, of course, would be his right—is not material to this case.

If the goods are moved on a Navy contract, not on a retail person to person basis, then clearly, they are without the retail institution, which is the 13(a) (2) exception or exemption under this act.

Mr. Moore: You mean the serviceman, and not the retail.

Mr. Beardsley: Yes; the definition of “retail” comes into that same exemption, and the question we are con-

(Testimony of Twyman R. Brammer)

cerned with is whether this is contract work done for the Navy on [168] the wholesale scale under such a contract, or whether it is individual work such as Mr. Cummins was describing as to their present functions. His testimony is about what they do now, where they go out and see the lady and take her bid and so on.

Coming down to my objection, the section which the witness has read has nothing in which it would bear upon the issues in this case. It states the Navy's definition of what is personal property of the particular naval personnel man.

Mr. Moore: That, of course, is the only section which he read, but I outlined the others which I thought were pertinent to the subject here before us, and that is: What are the rights of the naval personnel in connection with these goods?

The Court: Of course, we are concerned now with the fact that these may all have been ignored in the contract. There is no showing that these in any way apply under that contract.

Mr. Moore: Yes; all of these rights which the naval personnel have, as provided in the regulations, are the rights which the carriers are subjected to.

The Court: Well, we haven't any evidence on that.

Mr. Beardsley: That is where the foundation lies, if the court please.

The Court: We have no evidence of that, have we?

Mr. Moore: Of course, we have this man on call here, who has come actually out of turn at our request, and we do not want to keep from his work. [169]

The Court: That is satisfactory.

(Testimony of Twyman R. Brammer)

Mr. Beardsley: I have no objection to their being identified.

The Court: But the point is that this witness is reading regulations that the court so far has no testimony to decide whether or not these were ever incorporated in the contract with the defendant. Suppose the Navy has just made a one-paragraph contract with this defendant and said there were certain specified rights. You shall do these things. This does not apply to these regulations. In other words, the contract, unless it specifically incorporates these provisions, they would not be pertinent in the case, would they?

Mr. Moore: If the Navy made a one-paragraph contract and said: you are to move Navy personnel's goods and the Navy personnel are granted by Congress broad Navy regulations, these rights in connection with their personal goods, I think it is by reference incorporated in the contract as much as any other right which either the carrier is subjected to or which the Navy personnel would have the right to claim whether they were party to the contract or not.

The Court: You mean without any reference to it?

Mr. Moore: Without any reference whatever.

Mr. Beardsley: I suggest to the court that these regulations really control the relationship between the man and the Navy. The man in the Navy is undoubtedly subject to Navy [170] regulations, but a contract with the Navy, I do not think would be subject to the regulations between the man and the Navy.

I have not seen the contract you signed. I do not know whether this is referred to or not, but clearly that

(Testimony of Twyman R. Brammer)

would be a necessary part of the foundation for this testimony.

Mr. Moore: I think that we can bring it out from this Navy man who is on the stand that all of the claims which the Navy man has are against the carrier. The Navy made the contract with the carrier for the removal of his household goods, but when the contract is in effect and the goods are moved through the carrier, whoever it may be, that the Navy has for his convenience, the man in turn has a claim for damage and it is against the carrier who carried it, without him having employed the carrier or having the contract with it.

The Court: That is on the theory that the contract is made for his benefit and the beneficiary can enforce the terms of the contract made for his benefit. I think that is the general law.

What I am concerned about here is that the Navy has designated certain articles that is the personal property of the particular enlisted man in the Navy. I am just wondering what the pertinency of that is, without having read this contract. That is what bothers the court at this time.

As both counsel know, if we get evidence in here that we [171] consider pertinent and pass judgment on it, and then find out in the Circuit Court that the evidence should not have been admitted and the court gave due weight to it, you haven't got any judgment.

I should think that this contract, which is evidently in the possession of the defendant, should be introduced into evidence and then show that these sections that the witness is reading apply to that contract, until I get to the point of determining whether or not that is evidence to

(Testimony of Twyman R. Brammer)

be considered. I cannot decide what evidence is admissible without knowing what the evidence is, and that is what is bothering me now.

Mr. Moore: May we have a stipulation here, then, that the book which this officer or this Navy man has brought is a set of official regulations of the Navy, and that it be left in the custody of the court for our future reference until such time as we are ready to identify or tie in the section which we have indicated are pertinent; and upon the conclusion of the case, that the manual be returned to the witness who is here on the stand?

Mr. Beardsley: Maybe I can be of service to counsel. I am not going to question the genuineness of the book which the witness brings here at all. I am sure he would not, and I know Mr. Moore would not, present a document which was not genuine. If he wants to make certified copies of the sections which he has in mind and offer the certified copies, when the [172] proper foundation is laid I can't see objection to that. I would stipulate these are the regulations which this man is under, and he can take that book home with him tonight. That is the way I understand it.

The Witness: May I make a suggestion?

The Court: All right.

The Witness: I can take out the section that applies to the shipment of household goods, I think, and leave it in the custody of the court.

The Court: How long is it?

The Witness: Oh, it is just about 20 to 30 pages.

The Court: All right; that will be satisfactory. That is all that we want.

(Testimony of Twyman R. Brammer)

The Witness: And I can state that these regulations were in effect during the last past few years, during the time of this contract.

The Court: Do you know when this contract went into effect and when it terminated that is involved in this action?

The Witness: I would not state that it was in effect during all of the action, no; because I do not know all of the dates. I was in the service several years and I have not kept up on that.

The Court: Who would have the information?

The Witness: You can get it. You can request from the Naval Supply Depot, San Pedro, to get a statement of the dates [173] of the contracts and who held them for the period, and I will furnish it through the attorney.

The Court: All right. Mr. Moore, you will take care of that. That is all, thank you.

Mr. Beardsley: May I have the witness' telephone number in case we should need to call him back to court? Is that satisfactory? Do you have a telephone number?

The Witness: Terminal 22611, extension 150.

The Court: Do you have a telephone at your home, too?

The Witness: Yes, sir; Terminal 24862.

The Court: What is the address?

The Witness: 1600 Dodson, San Pedro.

The Court: All right; thank you.

Mr. Beardsley: May those (regulations) be marked B for identification?

The Clerk: Yes; that will be Defendant's B for identification.

Mr. Moore: I will call Mr. Diegel.

MAYNARD DIEGEL,

called as a witness by defendant, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Maynard Diegel. [174]

Direct Examination

By Mr. Moore:

Q. What is your address, Mr. Diegel?

A. 1422 South Delmar, San Gabriel.

Q. Are you presently connected with the Coast Van Lines, Inc.? A. I am.

Q. In what capacity?

A. I am assistant secretary and manager.

Q. How long have you been associated with the Los Angeles office of the Coast Van Lines?

A. Since October the 25th, 1944.

Q. Was that immediately following the purchase of the stock in the change of ownership as it now exists?

A. That was on the day.

The Court: Up to the present time?

The Witness: Up to the present time.

Q. By Mr. Moore: And you have been so engaged since? A. That is right.

Q. Are you familiar with the accident or fire which took place in the building of this property about June of 1944?

A. Am I familiar with the—what was the question, sir?

Q. I say, were you here at the time the fire occurred?

A. No. That occurred on June the 4th, 1944 and I came [175] down in August of '44, and then immediately was employed by the company in October.

(Testimony of Maynard Diegel)

Q. Did you say you came down shortly after the fire?

A. Yes, sir.

Q. I show you a picture and ask you if that is a fair representation of the condition of the office and warehouse at 423 East Third Street shortly after the fire which occurred there on June 4th?

Mr. Beardsley: Now, just a moment, for the purpose of an objection. I object to that on the ground that the witness has stated he was not here at that time. The record may show—excuse me—that the picture appears to be dated June 5, 1944, and this witness has testified that he was not here until sometime in August.

Q. By Mr. Moore: Did I understand correctly that August was the first time you were down here after June, '44?

A. That is right.

Q. And you did not see the premises then?

A. I did not see them in this condition. The rubbish was taken out when I saw it.

The Court: All right; objection sustained. Proceed, Mr. Moore.

Q. By Mr. Moore: Mr. Diegel, as manager of the Los Angeles office of the Coast Van Lines, do you have charge of the books and records of the company? [176]

A. Yes, sir; I am in charge of that end of the business.

Q. Are all the records of the company kept under your jurisdiction?

A. They are.

Q. Have you had occasion to make an examination of the records of the company for the month of June, 1945?

A. For July, 1945.

Q. For July, 1945. Have you examined those records?

A. Yes; I have.

(Testimony of Maynard Diegel)

Q. How do you normally break down your records for your business? Is it divided according to your transportation or hauling or storing or packing or—

A. Our books break it down into three principal divisions: one for storing, one for packing and crating, and one division for transportation. That is the final records. That is the way the ledger accounts are, the general ledger accounts are kept. However, the original entries contain other data that we have worked on.

Q. What other sources of original records do you have besides this ledger?

A. In nearly all cases are what we call our waybills, freight bills, are the source of original entry. What I mean, that is the first. That is the first thing that is written. From that the operation is performed, and then that waybill comes to the office and is properly divided into the principal [177] divisions as I have stated.

Q. From an examination of these records, Mr. Diegel, what do they disclose was the storage business done within the state or without the state, that is, the interstate commerce or intra-state business entirely within the state in the storage department during the month of July, 1945?

Mr. Beardsley: That is objected to on the ground the testimony does not show thus far that there is any separation between intra-state and interstate business. He testified to the other three divisions.

The Court: Ask that question first, Mr. Moore.

Mr. Moore: I beg your pardon? I did not hear you.

The Court: Ask that question first, if there is a breakdown.

(Testimony of Maynard Diegel)

Q. By Mr. Moore: Do your records show whether the business of the storage department, packing and crating or transportation is interstate or intra-state?

A. Our principal records do not show that, but we have worked up a break-down for July, 1945 which does reveal how much is intra-state and how much is interstate.

Q. And how was that done from the records?

A. Well, we had to pull each individual waybill to ascertain from the information on it if it was a shipment that was going to ultimately leave the state; and if the information was not there and it happened to be a Navy shipment, [178] we could tell from the confirmation or the instructions we received from the Navy whether it was going out of the state or in the state.

The Court: Have you got that information?

The Witness: Yes, sir; I have.

The Court: All right; let us have it.

Q. By Mr. Moore: What did your storage business show for the month of July regarding intra-state and interstate business?

A. For the month of July there was \$17,344.65 worth of intra-state business and \$11,754.94 worth of interstate business.

The Court: Give me the "intra" again.

The Witness: The intra, your Honor, is \$17,344.65.

The Court: All right. Is that just under the Navy contract or is that your general business for July?

The Witness: That takes in all the business, the Navy and the—

The Court: Public.

The Witness: —and the other, what we call our all other business.

(Testimony of Maynard Diegel)

The Court: All right.

Mr. Moore: Your Honor, I have a summary of Mr. Diegel's work I have handed to counsel and, in the interest of time, would the court care to have that summary introduced with what- [179] ever questions will be necessary?

Mr. Beardsley: May I ask one or two questions on voir dire?

The Court: Yes.

Q. By Mr. Beardsley: Mr. Diegel, this is a summary not prepared in the normal course of the business, but prepared for use in this case, where the issue of whether business is intra-state or interstate is raised, is that correct?

A. That is right. We had to go to the original source, original entry of the original documents to determine this.

Q. And this typewritten summary which you have before you now was prepared for use in this trial and not in the ordinary course of business?

The Court: He said yes.

A. That is right.

Q. By Mr. Beardsley: You do not have any regular records other than summaries prepared for this special purpose, showing this information?

A. That is right. We can substantiate all of these figures.

Mr. Moore: At this time we will offer into evidence the summary of Mr. Diegel as defendant's next numbered exhibit.

The Court: Admitted.

The Clerk: Defendant's Exhibit C in evidence.

(Testimony of Maynard Diegel)

The Court: Is there a copy for the court? I believe [180] that is for the record.

Q. By Mr. Moore: In all departments of your business, whether it was the storage, packing or crating or transportation, did you find more than 50 per cent in intra-state business in the month of July, 1945?

Mr. Beardsley: Now, that is objected to as calling for a conclusion of the witness. Counsel has now put in some sort of a record which I assumed the witness was going to testify from.

The Court: The instrument which has been marked as Exhibit C does not indicate on the instrument itself whether it is a year's business or a week's business or what it is.

Q. By Mr. Moore: Mr. Diegel, will you state what the Defendant's Exhibit C covers?

A. The Exhibit C covers a break-down for the month of July, 1945.

The Court: I see right on the top of it "July 1945-Total business of defendant." All right. The record, Mr. Moore, speaks for itself, doesn't it?

Mr. Moore: That is right, sir.

The Court: All right; proceed.

Q. Do you have any records of the total business done by your firm, based on six months' periods which run from August, 1942 up to the present time?

A. We took a period of three years, starting July 1, [181] 1943, and we broke it down into six months' sections, the first section being from July 1, 1943 to December 31, 1943.

(Testimony of Maynard Diegel)

Q. What was the total business that was done during that period?

A. In that period there was a total business done of everything amounting to \$185,503.07.

Q. What of that was under the Government contract, what amount?

A. We grouped the Government contract with other Government business which was not great, that is, the Navy contract was the biggest part of it, but we took all Government work and put it into one section and it amounted to \$87,743.21. Then that leaves a balance for all other work or revenue amounting to \$97,759.86.

Q. For the period from January 1, '44 to June 30, '44 what was the total business done by Coast Van Lines?

Mr. Beardsley: May I inquire again? I understood their records were burned. May I ask a little about where this information comes from, if the court please?

The Court: Yes.

The Witness: I think I can best explain that by the—

Mr. Moore: You mean on voir dire?

Mr. Beardsley: That is all right. That is what I want him to explain. Apparently he is starting out to explain it.

Mr. Moore: All right. Yes, sir. [182]

The Court: You may continue.

A. The office was on the first floor, and when the fire destroyed the building, two doors in the office—as I understand it from other employees that we have that are still with us and were there during the fire on the day preceding and following the fire, the reason that the records were burned and how they were burned was that the door of the office, two doors of the office, was left

(Testimony of Maynard Diegel)

open and the fire got into the office through those doors and damaged completely certain records that were nearest the doors and partially damaged, water damaged and smoke damaged other records, and some were intact.

It so happened that the night before the fire the auditor from the Internal Revenue Department was there working on the books and had some of the ledgers, one general ledger and some of the sales records, as well as distribution books, in the back office and they were completely destroyed. Then when the firemen came they removed, under direction of the company's managers, the documents and the books that were not damaged and put them out in the street, and some of them were left in pretty good shape and others not so good and some completely gone, and those were all taken over to 1320 Margo Street to another one of the warehouses and they were kept there until the Third Street building was rebuilt, and then they were brought back and we put them into our record room and we [183] still have them there in the condition that they are. They are rather difficult to work with. Some points, and these points, when I come to them, if I do in my testimony, I will specify where the records are incomplete and it is impossible for us to get the figures.

These figures are principally taken that I am quoting from—are principally taken from actual records we still have, such as the general ledger covering this period, and it was easy for us to take from them the figures that I quoted for that first period. There is nothing in these figures—

Q. By Mr. Moore: I take it that some of these accounts have supporting original source entry, but that

(Testimony of Maynard Diegel)

these figures have come from the general ledger which was supplied to you or which came to you at the time the firm was bought in October, 1944?

A. That is right. I got one section here of a previous six months' period from January 1, 1943 to June 30, 1943, in which I only have a total taken from the statement that we found, a financial statement, taken from some financial statements that we were able to ascertain the total, but we did not have suitable records to break it down into Navy and Government business and other business, but we did know the total. So then, I skip that six months' period as far as breakdown is concerned, and start with the next period, as I have already quoted, from January 1, '43. I have broken it [184] down into such divisions for a period of six-months' periods, or three years.

Q. By Mr. Beardsley: None of these records, up to the time you came here, of course, were prepared under your direction; you have them only as records which were turned over to you after this fire, is that correct?

A. When we bought the business, from an audit made, certified, accepted, and turned over to us as being correct for the previous years.

Q. Well, but the question is: None of these records were kept under your supervision? A. No.

Q. You are not referring now to the audit, but to the records, the original records such as they were left from the fire, is that it?

A. That is right. We had to accept the statement of the other stockholders.

Mr. Moore: Any other questions, Mr. Beardsley?

Mr. Beardsley: No; that is all.

(Testimony of Maynard Diegel)

The Court: Proceed.

Q. By Mr. Moore: What does your record show for the six months' period from January 1, '44 to June 30, '44 as the total business done by the company?

A. The total business was \$176,656.90.

Q. And of that what amount was under a Government con- [185] tract or Government contracts?

A. Navy and Government or Government business was \$100,547.72; all other business was \$76,109.18.

Q. For the period from July 1, '44 to December 31, '44 what was the total business of the company?

A. The total business was \$159,226.63.

Q. And of that what amount was Government contract work?

A. Government, \$68,816.72; other, \$90,409.91.

Q. For the period from January 1, '45 to June 30, '45 what was the total amount of business done?

A. The total was \$131,585.17, divided—

Q. Of that how much was Government business?

A. Divided, Government \$67,766.72; other, \$63,-818.45.

Q. From July, '45 to December 31, '45 what was the total business done? A. \$205,669.39.

Q. And of that what amount was Government business?

A. Government, \$108,174.48; other, \$97,494.91.

Q. Do you have a record for the period from January 1, 1946 to June 30, 1946?

A. Yes, sir. Do you want me to get you the figures?

Q. Yes; the total of the figures.

A. The total is \$178,352.01, divided, Government, \$101,208.75; other, \$77,143.26. [186]

(Testimony of Maynard Diegel)

Q. Mr. Diegel, have you made an examination of the records of the company to determine what per cent of the Government business for a six months' period is either intra-state or interstate in nature?

A. Yes; we have. We took a six months'—we took that July—quote the question again.

The Court: Repeat the question.

(Question read by the reporter.)

Q. By Mr. Moore: Have you done it for any six months' period, just yes or no? A. Yes; we did.

Q. What six months' periods have you studied?

A. We made three six-months' periods here from July 1, 1944 to December 31, 1944.

Q. And what else?

A. And also, two other six-months' periods from January 1, 1945 to June 30, 1945.

Q. Any others?

A. And July 1, 1945 to December 31, 1945.

Q. Did you go in those to the same extent as you did in the analysis you made for the month of July, 1945?

A. Yes. We analyzed—

Q. Merely intra and interstate character?

A. Yes. We analyzed every Navy and Government order or voucher for that entire period covered by those three six- [187] months' periods.

Q. Take the first six months' period beginning in July, 1944 of the Government business; what per cent was interstate and what per cent was intra-state?

A. We found that 59 per cent was intra-state, and that would leave 41 per cent for interstate.

(Testimony of Maynard Diegel)

Q. For the second period, January, '45 to June, '45 what per cent was intra-state and what per cent interstate?

A. 55 per cent intra-state, 45 per cent interstate.

Q. For the period from July, '45 to December '45 what per cent of the Government business was intra-state and interstate?

A. Intra-state was 53 per cent and the interstate was 47.

Q. Can you estimate the percentage of business other than Government business as to what per cent is intra-state and interstate?

Mr. Beardsley: Oh, I will object to the estimate. We are not objecting to these analyses made, if the same process was gone through. I think it would be entitled to the same weight, whether it is, as this testimony.

The Court: I understand that is what he is asking.

Mr. Beardsley: He asked him if he would estimate. Heretofore he has not asked him if he would estimate. He said: Have you analyzed, order by order and found out exactly where [188] it was going?

The Witness: Let me give you on one month.

Q. By Mr. Moore: What month is that?

A. July of 1945.

Q. What did you find in the month of July of 1945 for other business other than Government business as to what was intra and interstate?

A. 12 per cent was interstate and 88 per cent was intra-state.

Q. Have you made any cursory examination of other months to determine what that percentage would approximate for other than Government business?

(Testimony of Maynard Diegel)

Mr. Beardsley: I will object to any testimony about cursory examination. The records are there in their control and it would not be proper testimony.

The Court: Your witnesses have speculated on that without any records or anything else.

Mr. Beardsley: They have no records. These people have the records.

The Court: Oh, no. But I permitted your witnesses who were in the warehouse, etc., and who packed these to say about what they thought, without any information in front of them.

Mr. Beardsley: That is true, your Honor. But, of course, it is always the position of an employee that he has no [189] records. And apparently as to these periods now being testified about, they are periods shortly after the fire, when they have complete records, and I think that a cursory examination of them is not a proper basis for an auditor's statement.

Mr. Moore: Mr. Jamison, I think, was the vice-president and he was testifying from—

The Court: Continue, counsel.

Mr. Moore: I did not hear the court.

The Court: Continue.

Mr. Moore: Will you answer the question, Mr. Diegel?

Mr. Beardsley: Was the objection overruled, your Honor?

The Court: Yes. It goes to the weight of the testimony. I will find out what he has.

A. The all other business, it is self-evident to me in the position that I am in to know very close to the percentages, the very fact that—I won't get involved in that.

(Testimony of Maynard Diegel)

But it runs between—it would vary a little bit—it would run between 80 and 95 per cent intra-state and 5 and 20 per cent interstate.

Q. By Mr. Moore: What period does that approximation cover?

A. Well, that would cover under my personal supervision from October 25 of '44 to date; and I feel certain that investigation would prove that the other months would fall under those percentages, because I do have access to previous [190] records which, in other divisions or other investigations, have shown that they run nearly consistent with the business as I know it.

The Court: You can work out the figures for us between now and Tuesday, can't you?

Mr. Moore: Your Honor, that was one of the things that this was all leading up to. We give the court as complete a picture of what we have. As an indication of the time it takes from an examination of each of the original sources to divide them into the intra and the interstate goods, because the basic records are not kept in that particular classification or that separation, and we are in a position of again offering to find as much as the court feels that is necessary. We find that it takes about 100 man hours to produce the one month which we have made the detailed examination of.

I think the court will also observe that that particular month was taken from a six-months' period in which the Government business was probably larger than the other business, which we considered would be the most advantageous of any period that we had during the time that we were in the midst of this period, subject to reduction.

(Testimony of Maynard Diegel)

The Court: But, you see, the figures are at such severe variance, the actual figures that he gives, from the guess that he gives, that that is why the court made the inquiry, to justify in some measure such a terrific disparity between [191] the figures.

The Witness: Your Honor, I must have been misunderstood, then.

Mr. Moore: If I may repeat what I understand. My question to him was what per cents of the business other than Government business, by the figures that they had analyzed for the month of July, 1945, constituted intra-state business and what interstate, that is, exclusive of the Government business. In other words, this group that was listed as \$108,000 in that six months' period was Government business, while \$97,000 was other business. For the month of July the amount of business done other than Government, I believe he testified constituted 80 per cent in intra-state business, and that in the Government over these six months periods ran approximately 59 per cent, 55 per cent, and 53; and that the only period that an exact test was made for other than Government was for July, and his opinion was that for all of the periods, approximating what it would be with the knowledge he has of the records and working with them, that it would run between 80 and 95 per cent intra-state business on other than Government business.

The Court: No; that is not the testimony. The testimony is that in July, 1945 other business, not Government, interstate was 12 per cent.

Mr. Moore: Correct. [192]

The Court: And 88 per cent was intra.

Mr. Moore: 88 per cent, is that the intra-state?

(Testimony of Maynard Diegel)

The Court: That is right, intra. Now, when he guesses at it, then he cuts the other business, and other than Government business in interstate more than 50 per cent and takes that down to five per cent.

Mr. Moore: Inter or intra?

The Court: Interstate. Five per cent, which is less than 50 per cent of his actual figures that he gave, and 95 per cent intra-state. That is why the court made the remark.

Mr. Moore: His estimation was 80 to 95 per cent.

The Court: Oh, no. His estimate was 95 per cent, leaving five per cent for interstate.

The Witness: Your Honor, can I explain what I mean.

Mr. Moore: May I have the reporter read the record?

The Court: What did you say, Mr. Moore?

Mr. Moore: I say, with the court's permission, I would like to have the reporter read the answer, in answer to the estimate, of what was the intra-state business other than Government, following his statement of what the intra-state business was in July of 1945.

The Court: Can you find that, Mr. Bargion?

(Record read by the reporter.)

The Court: I just put down "95" there, Mr. Moore.

Q. By Mr. Moore: Do I understand, Mr. Diegel, from that, [193] that you mean five to 20 per cent would be in direct ratio with the higher or lower intra-state business done during a particular period? You estimate, as I understood, five to 20 per cent interstate, and if it was five per cent in one month, that would mean 95 per

(Testimony of Maynard Diegel)

cent intra-state and five per cent inter, or 80 per cent intra and 20 interstate? A. That is right

Mr. Moore: That is all.

Mr. Beardsley: Is that all with this witness?

Mr. Moore: Yes.

Cross Examination

By Mr. Beardsley:

Q. Now, Mr. Diegel, the one month which you thoroughly analyzed on question of division of business between Government, commercial, and other classifications, and division between interstate and intra-state, was this month of July, as shown by Exhibit C, is that correct?

A. That is right.

Q. And you say that you have the accurate figure there; that the per cent which was interstate was 12 per cent and intra-state 88 per cent during that month?

A. That is right.

Q. Does that carry through all of the three divisions of the business of the company you have mentioned or is that [194] a total?

A. That is through all three divisions.

Q. I see. Now, when you started to testify and before this Exhibit C was introduced in evidence or just as it was being introduced, you gave some figures on intra-state and interstate: \$17,344.65 intra-state and \$11,754.94, I believe it is.

The Court: That is right.

(Testimony of Maynard Diegel)

Mr. Beardsley: —Interstate. Now, that percentage, of course, is almost equal, isn't it, between intra and interstate; that was storage business, as I noted your statement, for July, is that right?

A. No. That was the total business for July, \$29,000 worth of business, of which \$17,000 was intra and \$11,000 was inter.

Q. That is the total storage business or the total business of the company?

A. That is the total business; that is everything.

Q. Is that in the ratio of 12 per cent to 88 per cent, those two figures you have just given, 11 and 17?

The Court: That is argumentative, counsel, and self-explanatory.

Q. By Mr. Beardsley: Well, is it your testimony now that those figures: 17,000—I am not giving the odd amounts—and 12,000 represent the intra-state on the larger [195] figure and the interstate on the smaller figure?

A. That is right.

Q. Business for July? A. That is right.

Q. Can you show us on this Exhibit C how you arrive at those totals? I just don't have any totals, apparently, except the right-hand column here.

A. Well, we took all this storage business, we took all of these figures. Here is the \$10.00, the 51.25, the 85.94, the 2034.49, the \$21.00, the 33.90, the 39.00, the 1572.32, \$204.50, .75, 2.25, 80.10, 2103.13; and that was all the intra-state under storage, because there was no interstate. So that was all under this column. We are going to get to "2103.13," down to there.

Now, then, in the "Packing & Crating": we recite 7.52, 244.89, 14.63—

(Testimony of Maynard Diegel)

Mr. Beardsley: Wait a minute.

The Witness: It is reversed. Do you want me to check them? Start up here and we will check them. 7.52, 244.89, 14.63, 158.69, 1649.38, and this red figure, Mr. Beardsley, is in there because it was a credit. It was put in there for a correction of a previous month. The same way with this red figure, and we used it merely to arrive at a total to see that we were close to our controls; that we were coming out on this analysis as our books would show. [196]

Then this was intra-state, and then we would take the intra-state from over here, and 690.89, 24.10, 283.81, 6408.33, 1965.19, and that was all the intra-state business, and it adds up to \$17,000 in round numbers.

Q. Now, just a minute. You say that adds up in round numbers. Do you mean that is the equal total of those figures, or are you taking off the two red figures?

A. We are taking off the two red figures.

Q. All right. Then the totals you have given us do not come directly from those on Exhibit C, and they take into account the two other figures which do not appear on Exhibit C insofar as the July business is concerned?

A. The figures are small. There is one of "172.73" and one of "168.68," and we did not incorporate it in there because they are more or less confusing and outside the issue we wanted to get at in this particular analysis. We wanted to get at the total, and it would not throw off the percentage at all owing to the fact they are small.

Q. Did you or did you not subtract from the total of these figures you have just read into the record these two other figures in red ink?

A. Oh, yes; we subtracted.

(Testimony of Maynard Diegel)

Q. You did?

A. Because this figure actually corresponds to our books. [197]

Q. Then Exhibit C does not exactly correspond to your books?

A. Not to within two or three hundred, around \$300.00, on account of those credits.

The Court: What is the exhibit number the witness is testifying from now?

Mr. Beardsley: Exhibit C is the one I hold.

What is it you are testifying from where you have made your pencil checks?

A. It is a recap of the July, 1945 month's business taken from the data that I have here, and also, the same as we have on there, but we did not incorporate the credits, as I say, because it would be rather confusing, and if it was a larger amount, we would have to offset it some other way. But this was just for our convenience in showing. We did not need to even show these figures. We could have made this figure show just exactly the same as that. That \$300.00 would not have hurt the percentage at all. We just merely did it so we would know if we were off at all in our figures from our control.

The Court: What is the exhibit number?

Mr. Beardsley: Exhibit C is the one I hold, your Honor.

The Court: What is the other one?

Mr. Beardsley: Is that the one you are referring to, your Honor? [198]

The Court: No. I am referring to the one the witness is referring to.

Mr. Beardsley: That is not in evidence.

(Testimony of Maynard Diegel)

The Court: Mark it, will you?

Mr. Beardsley: Do you want this as your exhibit next in number for identification? It is brought in by the defendant. I suggest we give it the defendant's next number for identification.

Mr. Moore: My only observation might be, Mr. Beardsley, that rather than taking one sheet out of all these things which he has used as original source of entry, if the court desires, they could all go in.

The Court: All right; as one exhibit.

Mr. Moore: As one exhibit.

The Court: How many pages, Mr. Moore?

Mr. Beardsley: I am not offering those in evidence, if the court please. There is no testimony to support any of them.

The Court: They are just being identified because the witness testified from them.

Mr. Beardsley: That is your number, the defendant's next number?

The Clerk: This will be Defendant's Exhibit D for identification.

Mr. Moore: There are one, two, three—what do you call [199] these, Mr. Diegel?

The Witness: Work sheets.

Mr. Moore: Three stapled work sheets with adding machine tapes at the rear, and three small-sized work sheets making up Defendant's D for identification.

Q. By Mr. Beardsley: Isn't it true, Mr. Diegel, that under the Navy contracts the months of June and July

(Testimony of Maynard Diegel)

were the lowest months in volume of Navy contract work of all the months of the year?

A. No. We picked this because it was a good average month. It was a pretty husky one.

Q. Don't you know as a matter of fact that the bids are called for on Navy contracts as of the end or beginning of the fiscal year, about July 1st, and that there are fewer orders on Navy work during those months immediately before and immediately after July 1st than in any other months of the year?

A. I don't know that; no. I know that July was a good—we picked July '45 because it represented considerable tonnage crated and handled for the Navy that month. I could analyze it further. I do not have the figures here but I could analyze it further and have it for presentation later, and show you how the months run, and that dates from this period.

Q. To your knowledge, then, it is not true that June and July are low months on the Navy contracts, is it? [200]

A. It is not; no.

Q. All right. Now, let me show you Exhibit C again and you show me what ones of these various items on it are Government or Navy contract work under I.

A. There is none.

Q. And paragraph (f)?

A. There is none.

Q. All right. That is the only one under "Storage" that you say is Navy work during that July was 75 cents?

A. That is right.

Q. Out of around \$6,500?

A. That is right. That was all the storage. The Navy pays for no storage.

(Testimony of Maynard Diegel)

Q. Now, let me get that straight. If the material was brought in belonging to Navy personnel, under your Navy contract and put in the storage house, wouldn't that be Navy contract work?

A. Well, you mean for how long a period of time?

Q. You would bill the storage charges, would you, to the individual, but you would bring it in originally under the Navy contract, would you not?

A. That is right.

Q. That is, suppose this:—I am testing now all of your analyses—supposing a shipment of goods comes in from Washington, D. C.. a Navy officer assigned to California; [201] his goods come in through interstate commerce on a freight car; he does not have a house to move into when he gets to Los Angeles; those goods go into your storage warehouse, don't they?

A. That is right.

Q. And then he is allowed a certain amount of storage, is he, that the Government pays for, and thereafter he pays for it, is that correct?

A. At one time, for a six months' period of time he was allowed 15 days free storage with us, and then it was placed into storage, but those 15 days do not appear here as "storage." We did not break that down or contribute to storage revenue for the 15 days; so it does not appear in there. So this is storage that we collected from the individuals.

(Testimony of Maynard Diegel)

Q. Now, there was undoubtedly in this very large item here "Individual"—that is I (d) on Exhibit C, which is \$5,709.94—undoubtedly much of that is money received from Navy personnel, is it not?

A. I haven't broken that down. Some of our revenue for individual storage was from Naval officers but it was not paid by the Navy.

Q. All right. But my point is that that business came to the company under the Navy contract, didn't it, originally; the company was the successful bidder for that Navy business, [202] wasn't it? A. That is right.

Q. And the Navy, however, only paid a portion of the cost; it paid certain moving expense and storage for 15 days, and then the man had to pay his own?

A. Yes.

Q. Or the man paid his own if it was over a certain amount, and then he gets that in case of moving, is that correct?

A. Yes; he could have moved it to another warehouse if he didn't want to store it with us.

Q. Then he would have had to pay the cost of moving it, wouldn't he?

A. I think the Navy would give him another move.

Q. I think we are conjecturing now, perhaps, about what the contract would involve in the way of moving his goods to another warehouse. But, at any rate, under the head of "Storage"—that is the first division before you, I of Exhibit C—while you only have 75 cents in revenue shown as coming from the Government, much more of the revenue in that section comes from business which

(Testimony of Maynard Diegel)

came through the company through the Government contract, isn't that correct?

A. A small percentage of it came that way.

Q. Let us go down to Division II. The only amount in "A" of Division II coming from the Government is "244.89"? [203]

A. That is right; that is directly from the Government, and this figure here under "Individuals."

Q. That is II "A", Item (4)?

A. Yes. That is for packing and crating, and this was paid to us by the Government for individual packing and crating shipments that went within the state.

Q. In other words, your testimony is that in the "Packing & Crating" division which, under "intra-state" is Item (4), it is broken down into "1" and "2", and the "2" there, the larger amount, is Government money, is that right?

A. That was Government money paid us for individual packing and crating jobs; that is right.

Q. Is the same thing true of Item (3) B which is broken down into "1" and "2"? A. Yes.

Q. The larger item, No. 2, was Government paid, was that right? A. That is right.

Q. Is the same thing true under the Item III Transportation where it is broken down into divisions "1" and "2" under "Individuals"? A. That is right.

Q. Will you show me some other sheet that you have in that exhibit, Defendant's for identification D, where you have worked out this percentage of what is intra-state and [204] what is interstate, or did you work it out

(Testimony of Maynard Diegel)

on any of those sheets for any month other than July, 1945?

A. Only for July—for the whole business, only for July.

Q. Did you use the same method of working it out for each period about which you have testified, that is, that you have shown all of the storage business as intra-state and none of the storage business as interstate?

A. All of the storage we have shown is intra-state.

Q. And therefore, if a shipment came from outside of California into California and went into storage that would not be classified in the percentages you have given us as being interstate commerce, is that correct?

A. No. It came to rest at our warehouse and ceased to be an interstate shipment.

Q. Even though you later shipped those goods either to a location in California or somewhere out in California, while they were in your warehouse you would consider them intra-state in all of these percentages you have given us, is that correct?

A. That is right.

Q. Have you any break-down or is it possible for you to make any break-down which would show what proportion of that revenue from goods in storage refers to revenue from goods which had come in from outside of the state and rested [205] in your warehouse, or were resting in your warehouse before going to some point outside of the state?

A. It would be pretty hard to take that off of our books.

Q. You do not have it taken off, I mean, in a summary?

A. We do not. Oh, no.

(Testimony of Maynard Diegel)

Q. In your segregation in these several periods of six months which you have given, those periods where you gave the total business of the company and the Government and Navy business and all other business, that segregation—

A. Yes, sir.

Q. Did you designate as Government business there the same type of entries which you designated as Government business on Defendant's Exhibit C, or did you include some more than those which are designated Government business on Defendant's Exhibit C?

A. No; it was the Government business, was taken, the same method was used.

Q. So that nothing which is not labeled "Government" business on Defendant's Exhibit C would be included among the proportion which you call Government and Navy business on those estimates dividing the total revenue of the company over several six-months periods?

A. We took them from the same source. There is no difference.

Q. Then, in other words, under "Storage" it would be [206] akin to Item I (b) under storage activities only, and not including items such as I (d) which are called "Individual," is that correct?

A. Oh, yes, because that was paid us by the individuals.

Q. And therefore, in your estimate of the gross business and how much of it came from the Navy contract you did not include in those six-months periods any revenue from goods in storage although they originated from the Navy contract?

A. No; we don't. That is all in—that is not any part of the Government business because it is placed in

(Testimony of Maynard Diegel)

there and left with us by the individual, and we place it in storage just like we would any lot that would come to us.

Q. Is it true, also, that in making up those six-months divisions, break-downs of the company's revenue in the packing and crating end of the business, that you designated as "Government" in that break-down the same items designated as "Government" on Exhibit C, Defendant's Exhibit C?

A. In that we included this Item (4) "2", or Item "2" under "(4)" called "Individuals," we included this money that we got from the Government. Under "Packing & Crating" we included in these figures that I read from—this last Exhibit D, I think it is—all of the money that we got from the Government is included in these figures.

Q. But nothing is included under that classification of "Government business" which was paid for by the individuals. For example, if a Commander in the Navy shipped goods in [207] excess of the amount the Government allowed him to ship, so that it paid only a part of his shipping cost and he paid the balance of it, that balance in this break-down you have given us would show under "all other business" and not under Government and Navy, is that correct?

A. We never had one like that. That didn't enter into it as far as we are concerned.

Q. There has been testimony here that they had certain limits on the amount that a man could send, and if he sent more than that amount he had to pay for it himself. You do not have any recollection of that occurring?

A. No.

(Testimony of Maynard Diegel)

Q. By what company were you employed just before you came down here?

A. By Market Street Van and Storage in San Francisco.

Q. That is the same concern Mr. Cummins is still associated with, is it? A. Yes, sir.

Q. Are you still employed by them at all, or are you full-time with Coast now?

A. I am full-time with Coast.

Q. In making this estimate of their business, that is, business other than Government paid-for business, from 80 to 95 per cent of it was intra-state and from 5 to 20 per cent interstate during the period October 25, 1944 to date, did [208] you use the same method of estimating that percentage that you used in computing the percentage for the month of July, 1945 which you gave us as 12 per cent interstate and 88 per cent intra-state?

A. I never had actually figured that out before. Just from observation, I have always felt that those percentages that you last quoted were about right. During recess for lunch today I figured this month of July and I took that exhibit on that white paper over on your desk.

Q. That is Exhibit C, Defendant's Exhibit C?

A. Exhibit C; I took that and I worked out a certain portion of the Exhibit D, and it came out 88 per cent intra and 12 per cent interstate. And the way I did it was to use all of the storage as intra and all of the packing and crating it shows on Exhibit C as intra-state, and I subtracted from it the amount that the Government had paid us and carried the balance out, because the balance is all we are talking about; and this "all other business," and the same way on down through the transportation

(Testimony of Maynard Diegel)

division; and it comes out with the totals of \$15,000 worth of business broken down to 1,800 interstate and 1,300 intra-state, and 12 per cent of 15,000, nearly \$15,100, is 1,800 and some dollars, which is close within a fraction of a per cent.

Q. All of these figures you have given on volume and percentage are based upon revenue, upon money revenue, are [209] they not?

A. That is right; that is correct.

Q. Is that on an accrual or cash basis?

A. Well, that would be on what we call our sales register, and it would be of items whether they were charge or cash items. That is all revenue items.

Q. And none of these figures you have given us are based upon volume of number of pieces or tonnage or in any other way than revenue, money?

A. Just the dollars and cents revenue.

Q. Are there different rates for the time spent in the packing and the time spent in going to and from jobs; is there a different rate of charge for the time on those two operations?

The Court: Is that material, counsel?

Mr. Beardsley: I think it might be, if the court please. Some of these waybills which were introduced this morning seem to indicate a different method of computing time for the driving time and for the packing time, and I do not know what the explanation of that is. I thought it might lie in this difference in charges.

(Testimony of Maynard Diegel)

The Court: It is pretty far-fetched, but go ahead.

A. On some of the shipments done under contract there is one lump sum used, so much per hundred pounds; and it covers all operations that are performed on that particular [210] job. Others, where it is not under contract, why, there is one rate charged for cartage and one rate charged for package.

Q. By Mr. Beardsley: Which is the higher rate, the rate for packing and loading the van, or the rate for driving out and back? Do you know which is the higher rate charged to the customer?

Mr. Moore: Do you mean for labor performed, the materials supplied, or what?

Mr. Beardsley: The rate per hour of the charge to the customer; do you know which is the higher?

A. For the greater portion of the time that we are talking about, from August 22, 1942 to August 22, 1945, for the greater part of that time the rate per hour, two men and a van, was \$5.00, and the rate for packing was \$1.75 an hour.

Q. Per man? A. Per man.

Q. Is it now \$5.50 per hour for two men and van?

A. \$5.50 and two, but that is only recent.

Mr. Beardsley: That is all, if the court please.

The Court: Any questions, Mr. Moore?

Mr. Moore: No questions.

The Court: All right. Call your next witness.

Mr. Moore: Call Mr. Cummins again.

JAMES CUMMINS (Recalled) [211]

Further Direct Examination

By Mr. Moore:

Q. Mr. Cummins, I show you a series of pages stapled together, the first of which is a page marked "tender" and the last of which is page 22, the heading "Schedule 59248," the same schedule number appearing on the first page of the tender, and ask you if you have seen this document before? A. I have.

Q. Will you tell us what that document is?

A. This is the Navy contract that we were awarded sometime in May, 1945, to cover the year's contract from June 1, 1495 to July 1, 1946. In other words, that was the period that we had this Government contract.

Q. Is this the contract under which you performed during that year's period?

A. Yes, sir; it is.

Mr. Moore: I offer it into evidence as Defendant's next numbered exhibit.

The Court: In evidence.

The Clerk: Defendant's Exhibit E in evidence.

Mr. Moore: Your Honor, Mr. Diegel asked me a question about our Exhibit C, I believe, which is in for identification, and wanted to know the wishes of the court, if that should be left here until completion of proceedings or left in his custody since it is not yet in evidence. [212]

The Court: Well, it will be here until this is disposed of.

Q. By Mr. Moore: Mr. Cummins, I ask you to examine the Defendant's Exhibit E, particularly of those portions concerning the tariffs involved, and ask you if those tariffs compare favorably with the tariffs charged for individuals for similar types of work?

(Testimony of James Cummins)

Mr. Beardsley: That is objected to as not within the issues of the case and immaterial; and also, calling for a conclusion of the witness based upon matters not in evidence, what the tariffs are to the individuals, and not the best evidence of those tariffs.

The Court: What is the point, Mr. Moore, so I will be sure that I know?

Mr. Moore: Well, your Honor, I think it was raised by plaintiffs that, regardless of what work was done for the individual, whether it be for the Government or otherwise, that it constituted the bulk of lower priced rate, and that they felt that had some bearing on whether or not it was a service establishment or a service institution, by the price that was charged.

Mr. Beardsley: I have no such contention that the rates or prices charged had any bearing on that. I do not think I have made it.

The Court: I do not think it has any bearing at all and, [213] on the statement of counsel now, I do not believe it is material.

Mr. Moore: That is the only purpose for which the question was asked and I will withdraw the question.

The Court: All right.

Mr. Moore: That is all, Mr. Cummins.

The Court: Any questions?

Q. By Mr. Beardsley: Were there other contracts for other years, or do you know whether there were or not? A. Yes; there were.

Mr. Beardsley: That is all.

The Witness: You are relating particularly to the Navy contract?

Mr. Beardsley: Yes.

(Testimony of James Cummins)

The Witness: Yes; there were two other contracts.

The Court: That is all.

Q. By Mr. Moore: How many—

The Court: Well, go ahead.

Mr. Moore: Pardon me.

Q. How many of those were negotiated by you for Coast Van Lines and how many of them were in existence prior to the time of the fire?

A. When we took over in October—may I qualify my answer?

The Court: Yes; you may explain it. [214]

A. When we took over in October, 1944 there was at that time a Navy contract in existence which we operated under until June 30, 1945, and during the month of May, 1945 we negotiated this contract that I have in my hand.

The Court: All right; that is all.

Q. By Mr. Moore: I show you a document which consists of one page and ask you if you have seen that document before? A. Yes; I have.

Q. Is this the only remnant you have of 1944 contract that was in existence at the time you bought the business from your predecessors? A. I couldn't say.

Q. Have you ever tried to find the balance of this contract, which is signed by Harold Harris—the date apparently is not on this one page—but witnessed by—Anthony V. Valaitis, E. C. Jamison?

A. In answer to your question, when we were negotiating this contract we were not able to get the contract from a prior year, that is, the corresponding copy of it here.

Q. Let me put it another way: were there any representations made to you that this contract, or the balance

(Testimony of James Cummins)

of this contract outside of the one sheet, was lost prior to the time you took the business over?

Mr. Beardsley: That is objected to as hearsay.

The Court: Well, I will permit it. [215]

The Witness: I don't quite understand the question.

The Court: Repeat it, Mr. Bargion, and I think the witness will understand it.

(Question read by the reporter.)

A. Yes.

Mr. Moore: May I ask that this additional sheet be marked either for identification or be placed in evidence? It is an incomplete document.

The Court: It can be marked for identification. If you find the balance of it—I don't know how we could just put in part of it.

The Clerk: That will be Defendant's Exhibit F for identification.

Mr. Moore: That is all.

Cross Examination

By Mr. Beardsley:

Q. Mr. Cummins, do I understand that you people from the Market Street Company came in as successors of this company in October of 1944, that you never had a copy of the contract under which you did work for the Navy from that time until June 30, 1945, other than this one sheet identified as Exhibit F?

Mr. Moore: We so stipulate, counsel.

Mr. Beardsley: I do not want you to stipulate. I want [216] the witness' answer.

(Testimony of James Cummins)

Mr. Moore: All right.

A. Well, I don't want to be evasive, Mr. Beardsley. That, I know, was part of the original contract. We knew under what rates we were operating on. A copy of that or a copy of that full complete contract is on file at the Navy and is a public record.

Q. By Mr. Beardsley: You could get it and bring a copy here easily, couldn't you? A. Yes.

Q. Isn't the same thing true for each of the prior years, that copies of the Navy contracts are available, certified or otherwise, that you could bring them here?

A. Yes. Under subpoena, I imagine it could be done. I know it is a record in the Navy.

Q. You knew what the terms of your contract were from the period of October, 1944 to June 30, 1945, didn't you? A. Yes.

Q. How did you find out?

A. Well, we knew there was work had to be packed and crated, had to be picked up at the house. The personnel who were employed by our company were still with us. Mr. Harris, who had the company for many years, was still working there. I did not go up and read the contract in every minute detail to see that we used six-inch nails; or, in other words, we just [217] came in and took over the business and continued on operating it.

Q. Did you lose about half of the amount of the Navy contract when you negotiated this new one which you introduced in evidence as Defendant's E?

The Court: Is that material?

Mr. Beardsley: Yes, your Honor.

The Court: In what way?

(Testimony of James Cummins)

Mr. Beardsley: I think it goes to the volume of Navy business in the year before and the year after. I am informed that they had about half—

The Court: Go ahead.

Mr. Beardsley: Half of the business after that time that they had before.

The Court: But the contract itself would not in any way indicate the volume of business. The Navy would give them a contract to pay them so much for such and such work; but the contract itself would not specify, because the contract is made for the year together, and there is no one would know at the time the contract was signed how much work or how much crating was to be done in the year to follow.

Mr. Beardsley: If I correctly understand the fact, there was a good deal more work under the earlier contract, and that so-called typical month is the first month under this new contract which, if I am correctly informed, is of much [218] narrower scope. If that is true—I do not know that it is true—if it is true, it seems to me to be kind of material.

Mr. Moore: I think your interpretation of the evidence is incorrect, Mr. Beardsley, because for the period of July, 1945 the Government business was \$108,000 for a six-months' period as compared with \$60,000 and \$67,000 for two preceding six-months' periods.

Mr. Beardsley: But my question is whether you did not lose to Bekins or some other company a substantial part of the Navy business which you had under the earlier contracts?

The Witness: Well, I would say we lost to Bekins—

(Testimony of James Cummins)

Mr. Moore: Just a moment. I am going to object to that as being immaterial, irrelevant and not within the issues.

The Court: I do not believe it is. Sustain the objection.

Mr. Beardsley: That is all.

The Court: That is all. Call your next witness.

Mr. Moore: May I have the privilege of that Navy Manual, Mr. Clerk? At this time, your Honor, we would like to offer into evidence the excerpt from the Navy Manual read in connection with the contract which is now in evidence, particularly those portions of the contract which refer to the right of the individual. Paragraph F on page 17 provides:

“The contractor shall reimburse the owner for any damage sustained to effects due to improper performance of packing or draying.” [219]

As a third party beneficiary to the contract made for the benefit of the Navy personnel, or if not a direct contract for their benefit and the Government being their agent, by the various regulations of the Navy providing for the payment to the movant claims and the right of the Navy personnel in connection with their household effects in accordance with the contract.

The Court: Proceed.

Mr. Beardsley: May I be heard on that, if the court please?

The Court: No. No; it is just a matter of evidence.

Mr. Moore: May we at this time offer the manual subject to being withdrawn, on the Household Effects section, as Defendant's next numbered exhibit?

Mr. Beardsley: You are offering those sections you have enumerated before, I assume?

Mr. Moore: We are offering the "Shipment of household effects" running from section 1870 through section 1881.

The Court: In evidence.

The Clerk: That will be Defendant's Exhibit D in evidence.

Mr. Moore: At this time, your Honor, subject to the ruling of the court as to whether any additional periods may be desired for the court's examination, we should like to submit the matter of the service institution or service [220] establishment exemption, and either at this time or at a later time argue the matter or submit briefs on it in accordance with the evidence and facts which were presented this afternoon.

The Court: Other than that, is your evidence all in?

Mr. Moore: Other than the argument on our evidence on the issue of the service establishment, it is in.

The Court: You have other evidence you want to submit?

Mr. Moore: On other defenses, depending upon the plaintiffs' case. But I mean out of order.

The Court: All right; go ahead.

Mr. Beardsley: Do you want this matter argued now, your Honor?

The Court: No, no. I want this case tried, fully tried.

Mr. Beardsley: Very well, your Honor.

Mr. Graham, would you come up?

EARL GRAHAM,

a witness called by the plaintiffs, being first duly sworn,
was examined and testified as follows:

The Clerk: Your full name?

The Witness: Earl Graham.

Direct Examination

By Mr. Beardsley: [221]

Q. What is your present residence address, Mr. Graham? A. 6623 Priam Drive.

Q. P-r-i-a-m? A. That is right.

Q. Los Angeles? A. Bell Gardens.

Q. Were you at sometime employed by the defendant, Coast Van Lines? A. Yes, sir.

Q. What was the period of your employment?

A. October, 1941 to November, 1944. [222]

* * * * *

Q. What were you doing? What were your duties?

A. Well, I was loader, unloader, packer, unpacker, uncrater; in fact, everything of the business, with the exception of crating, under driver's salary.

Q. Were you driving?

A. I drove some of the time; yes, sir.

Q. What sort of driving did you do, on what sort of truck?

A. Well, I drove all the trucks, pickup, bobtail, semi, at different times.

Q. Were you what is called a line driver between cities? [223] A. No, sir.

Q. At any time? A. No, sir.

Q. Was your driving all local driving?

A. All local, unless Long Beach is considered.

(Testimony of Earl Graham)

Q. How frequently did you drive to Long Beach?

A. Oh, at one time I used to drive there about three days a week.

Q. And for how long a period of time was that?

A. About four months.

Q. And in what year? A. That was in 1942.

Q. Was that before or after August 19th?

A. That was after August 19th,—well, about two months before and about two months after.

Q. With the exception of the two months immediately after August 19th, 1942, your driving was strictly local, not even to Long Beach, is that correct?

A. Well, in November of '42 I went to Long Beach to work. I drove my car from here there and worked from Long Beach.

Q. From November of '42 until when?

A. Until February of '43, around the middle of February.

Q. Now, do you have in that book before you an [224] indication of when you last worked, or does that cover the period up to your last employment?

A. Just a moment. Yes; this covers from October of '42 until November of '43.

Q. What was the last day you worked?

A. I can't give you the exact date, but it was the first week of October.

Q. You just said "November." Do you mean November, now, or October when you finished work?

A. I finished work in November. On November the 4th that terminated my work at the Coast Van Lines entirely.

(Testimony of Earl Graham)

Q. Were your duties during the time you worked at Long Beach substantially the same as those you have outlined in Los Angeles? A. Well, yes, sir.

Q. Did you have any means of observing what of the goods that you handled, what the destinations were of the goods which you handled in this occupation?

A. A lot of them; yes, sir.

Q. What was it you could observe about them?

A. Well, I observed that some were shipped to Great Lakes Naval Station, some were shipped to Washington, D. C., some were shipped to New York City, New York, and South Carolina, Virginia—in almost every state of the Union.

Q. Were you able to form any estimate of the [225] percentage of the goods which you handled which traveled into other states?

A. Why, from Long Beach, 100 per cent.

Q. Will you explain why that was true?

A. That was total Navy work. There was no local work connected with the Long Beach office whatsoever.

Q. What about the percent when you were in Los Angeles?

A. Well, the Los Angeles firm at that time were farming their local work out.

Q. What do you mean by that?

Mr. Moore: I move that be stricken.

Mr. Beardsley: Just tell us what you mean, Mr. Graham.

A. Well, I mean by farming it out that they did not have enough equipment to handle the Naval work and the local work, too; so they would either give—I don't know what they did—but, anyway, they turned it over to an-

(Testimony of Earl Graham)

other company to be done by that company. That is the local work.

Q. What is your observation as to the percentage of the work which was interstate, going into other states or coming into California from other states, which you handled while you were in the Los Angeles location?

Mr. Moore: To which we object on the ground he is incompetent to answer. [226]

The Court: Is it pertinent what was shipped in from other states?

Mr. Beardsley: That is interstate commerce, I believe, if the court please.

The Court: Then, if it is, every retail establishment in this city is interstate commerce, everyone of them.

Mr. Beardsley: I think that is not correct, your Honor. I think the establishment which handles goods coming from outside to the receiver inside while they handle it in the state are in interstate commerce.

The Court: All this business is in interstate commerce, if you are charged with goods and merchandise that the shipper does not put into interstate commerce, whether it is shipped to him or not.

Mr. Beardsley: Coming in through interstate commerce this company handles them and brings them to the receiver here.

The Court: Brings them in here.

Mr. Beardsley: Yes; that is interstate commerce.

The Court: Then all these retailers are in interstate commerce.

Two o'clock on Monday.

Mr. Beardsley: All right.

(Whereupon, a recess was had until 2:00 o'clock p. m., Monday, October 28th, 1946.) [227]

LOUIS KANIR,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Louis Kanir.

Direct Examination

By Mr. Beardsley:

Q. Mr. Kanir, what is your residence address?

A. 2912 Ocean Drive, Manhattan Beach.

Q. Were you at some time employed by the defendant Coast Van Lines? A. I was.

Q. What was the date of your going into that employment?

A. Well, on or about the 1st of April, 1942, until [231] March, possibly around the 6th, I think, 1946.

Q. You were employed continually during that period?

A. Continually during that period, yes.

* * * * * * * *

Q. What were your duties?

A. I was a warehouseman. [232]

* * * * * * * *

Q. Were you at any time engaged in driving or working— A. No.

Q. Or working on a truck? A. No, no driving.

Q. Did you have any means of knowing as to the goods on which you worked in the warehouse, whether they were under Navy Contract or otherwise?

A. Why, the biggest majority I would say—

Mr. Moore: Just a moment.

(Testimony of Louis Kanir)

Q. By Mr. Beardsley: Did you have any way of knowing whether they were or not?

A. Only what I could tell was by the name on the crates.

Q. How would that show?

A. It would be "U. S. Navy."

Q. So you could tell from that what the goods were—whether Navy or otherwise? A. No. [233]

Q. I don't mean what was—what they were, but they were Navy contract?

A. I could not tell what they were—Navy contract or what they were, no.

Q. You couldn't tell?

A. No, unless I examined each one closely and looked for it. I didn't have time to do that.

Q. Did you have an opportunity to observe whether they were goods which were moving between states or not?

A. No, I did not—never got hold of the papers on that.

* * * * *

Cross Examination

By Mr. Moore: [234]

* * * * *

Q. By Mr. Moore: Can you give us a typical operation of that type? A. Why—

(Testimony of Louis Kanir)

The Court: Counsel, just a moment. This is just cumulative, cumulative of all the witnesses who have been on the stand. I think the court can take notice that when a van backs up to a warehouse somebody takes the merchandise off of the van and puts it on the platform and either by hand or otherwise takes it inside and stores it some place in the warehouse.

Now, if there is anything else you want to develop you may, but when you ask what a typical operation is in putting goods in a warehouse it is cumulative. If there is anything else you want to develop, counsel, you may do so.

Mr. Moore: If it is understood this man unloaded the trucks and put the merchandise in the warehouse that is satisfactory.

The Court: Certainly. He says he was a warehouseman. That was what he did. He said he wasn't a teamster and never did any driving. [235]

* * * * *

Q. By Mr. Moore: Was the merchandise which was stored in the warehouse where you worked to be shipped out? Did you also engage in loading it onto the trucks as it left the warehouse?

A. I never did any loading. All I did was bring it downstairs and the trucks would load it themselves. [236]

* * * * *

THOMAS P. REMUS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Thomas P. Remus.

Direct Examination

By Mr. Beardsley: [237]

* * * * *

Q. Now, what was the work which you did—what were your duties when you went to work there? [238]

A. I done all the weighing and stencilling.

Q. At what place?

A. At 423 East 3rd Street.

Q. Did you continue in that same employment during all of the time you were with the company?

A. Yes, sir.

Q. Were you at any time operating away from the place of business there—that is, out on trucks or anything of that kind?

A. No, sir.

Q. Did you have any means of observing what proportion of the goods you worked on or handled were Navy goods, under the Navy contract? Was there any—would you know about that?

A. Yes, sir.

Q. What was the way you would know?

A. Well, all—in fact, the biggest majority of it was all the crated stuff that was sent out was Navy because you had a—you had to get the Navy papers to know where it was being shipped at.

Q. You handled the papers at the same time you were dealing with the goods, is that correct?

A. If I didn't have it, why I got it from the Navy inspector.

(Testimony of Thomas P. Remus)

Q. And you say the biggest majority of the goods you [239] worked on were Navy goods, is that right?

A. Yes, sir.

Q. And did you know the destination of the goods also by reason of your job of stencilling?

A. Yes, sir.

Q. Can you say what proportion was interstate as between states as distinguished within California?

A. Well, I would say about 65 per cent was interstate—that is, between states. [240]

* * * * *

Q. Did you perform your customary duties of weighing and stencilling on that day? A. That is right.

Q. How many shipments went inside the state and how many went outside the state on that day?

A. I couldn't tell you.

Q. Was there any day during the time which you worked there that you can tell us that?

A. No, sir.

Q. Did you keep any records of shipments that went inside the state or shipments that went outside the state?

A. No, sir.

Q. Do you have any independent means, outside of your recollection, to verify the opinion which you have given? A. No, sir.

Q. Did you ever load merchandise or unload merchandise? A. That is crated merchandise in the car.

The Court: I don't think you have answered counsel's question.

The Witness: What was the question.

The Court: Read the question.

(Question read.)

(Testimony of Thomas P. Remus)

The Witness: Yes, sir.

Q. By Mr. Moore: What merchandise did you unload? [242]

A. The only merchandise I unloaded was the crated—crated stuff—crated Navy material. It was commercial stuff too that came in from different states.

Q. By Mr. Moore: What was it unloaded from?

A. Boxcars.

Q. Did you ever unload any from lip vans?

A. Unloaded lip vans from boxcars but not unloaded lip vans.

Q. Did you ever process furniture in the warehouse for preparation for delivery? A. No, sir.

Q. All of the observations which you estimated were based only upon the operations that you observed at the warehouse at East 3rd Street?

A. That is right.

Q. Did you ever have occasion to examine the way bills and determine whether a Naval officer was moving goods for his own account or for his account but contracted through the Navy?

A. Well, I only understood they were all moved by the Navy to a certain—they were allowed so many pounds and over that, why, it was on their own.

Q. Do you know whether or not any shipment that you ever handled was not—any shipment you ever moved which bore a Navy name was not under a Navy contract? [243]

A. I don't know.

JOSEPH SAVEDRA,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Joseph Savedra.

Direct Examination

By Mr. Beardsley: [244]

* * * * *

Q. What was your classification or what were your duties there?

A. I was hired as a crater—crated for three and a half months when the place burned down.

Q. Now, just a minute. That was at what place?

A. 423 East 3rd Street.

Q. And then after the place burned—

A. After the place burned I helped clean it up and then we resumed crating on whatever goods were not perishable. I don't know whether they were Navy goods or what they were that we were crating then.

Q. You say you don't know. Do you mean at any time or do you mean after the fire? [245]

A. After the fire. Before the fire we were crating Navy goods.

Q. 100 per cent or what proportion?

A. It wasn't 100 per cent, no.

Q. Do you have any idea what percentage?

A. No, sir, I don't.

Q. Was that your job all the time you worked there, crating? A. No.

(Testimony of Joseph Savedra)

Q. Then when did you change to some other classification?

A. I crated three and a half months and then I started helping on a truck.

Q. What sort of truck?

A. Van—on a line assignment, local packing and moving.

Q. And how long did you continue in those duties?

A. All the way through until July.

Q. Do you know whether the goods you handled while you were acting as a helper on the truck were Navy contract or otherwise?

A. Yes, they were Navy.

Q. All of them or substantially all of them?

A. Not 100 per cent but most of them.

Q. Do you have any way of knowing whether they were [246] goods traveling between states as distinguished from traveling within California?

A. Only by a way bill.

Q. Did you have any observation as to whether—what proportion of them were interstate shipments as compared with intra-state?

A. If an address meant anything that would be the only way.

Q. Do you know now what proportion of them were interstate shipments?

A. No, sir; I couldn't tell you what percentage.

Q. Just what were your duties as helper? Will you describe just what you did on the truck?

A. I packed.

Q. Packed dishes?

A. Packed dishes and bedding or whatever needed packing and then helped load.

Q. Was that loading for bringing into the warehouse?

A. Yes, sir.

Q. Was the loading for shipment between cities or between states?

A. It was loading for preparation for crating.

Q. You mean the goods were handled again before they went out from the Coast Van Lines' place?

A. They were handled in the crating room by the [247] craters to crate, yes sir.

Q. Your loading was to bring them into the place where they were crated? A. Yes, sir.

Q. And not on their way away from the Coast Van Lines? A. That is right.

Mr. Beardsley: That is all. You may cross examine.

Cross Examination

By Mr. Moore: [248]

* * * * *

Q. By Mr. Moore: Can you fix by any incident or happening in the year of 1944 the month that you started your employment with the Coast Van Lines?

A. Only by the contract that I signed—on what date and I don't know just when it was, whether it was April or May.

Q. What contract do you refer to?

A. That hired me as a crater, crating Navy goods.

Q. With whom was that contract signed?

A. Mr. Harris.

(Testimony of Joseph Savedra)

Q. Do you mean by that an application for employment?

A. Well, it was—I don't believe it was an application for employment because it was—it had all the dope about your draft board and everything like that and called for—sounded to me like a contract.

Q. What else did it provide?

A. Well, that I should stand—would be able to stand up to specifications as a crater—as a Navy crater. [250]

* * * * *

Q. By Mr. Moore: How many months did you act as a driver's helper?

A. Well, from the time that you say—the best recollection of my crating and the remainder of my time until I quit in June of 1945 which I guess would be about eight and a half months or nine months.

Q. How much time did you spend in cleaning up the place? A. After the fire?

Q. Yes.

A. Well, it wasn't very long because it was all burned down and they had salvage men and we were not cleaning up. We were doing what was salvageable. We were crating—we weren't cleaning it up. They had laborers cleaning it up. We were doing the crating of the salvage.

Q. Was that included in part of your three and a half months? A. No, that was after.

Q. How long did that take place?

A. About a month.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Witness excused [252]
Mr. Peterson.

GEORGE W. PETERSON,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: George W. Peterson.

Direct Examination

By Mr. Beardsley:

Q. What is your address. Mr. Peterson?

A. 2656 Benedict, Los Angeles.

Q. Were you employed at one time by Coast Van Lines, the defendant in this case?

A. Yes, sir. [253]

* * * * *

Q. What were your duties when you went to work there?

A. I hired out as a packer and then I drove from house to house picking up Navy goods and packing them and [254] listing them and taking them and hauling them into the warehouse.

Q. You say "on Navy goods." Was it exclusively Navy goods? A. All Navy goods.

Q. All under the Navy contract?

A. That is right.

Q. Did you do any driving or helping on any line truck—that is, trucks between the Coast Van Lines' place and any other city or state?

A. Just right in the city.

Q. Did you have opportunity to know the destination of the goods that you picked up and packed and brought

(Testimony of George W. Peterson)

into the warehouse, whether it was interstate or intra-state shipment?

A. They was all to be shipped—you had your Navy order stating on the order at the time where the goods was going but where they all went I don't know.

Q. Do you know what proportion of them went in interstate as distinguished from intra-state commerce?

Mr. Moore: Just a moment. There is no foundation laid. I object to the question.

The Court: Yes. you will have to lay a better foundation.

Mr. Beardsley: I think I asked him whether he knew, [255] if the court please.

Q. Do you know that now—Do you have any knowledge now about what proportion of the goods went in interstate commerce? I am not asking you what proportion went, but do you know what proportion went in interstate commerce?

A. Well, it was all for interstate.

Q. How do you know that?

A. It was marked on the Navy order.

Mr. Beardsley: Cross examine.

Cross Examination

By Mr. Moore: [256]

* * * * *

Q. Is there any day during your employment that you can tell us what merchandise you picked up and what its destination was?

A. Any day that I could tell you?

(Testimony of George W. Peterson)

Q. Any single day that you were employed by Coast Van Lines that you can tell us the various loads that you picked up and their destinations?

A. The only way I could tell you that, I would have to go to the Navy supply household goods and my name is on every slip that I picked up there. We made out five copies and the helper and the driver's name is on every one of them. That is the only way I can tell you and only by my time cards.

Q. You don't have any recollection of the destination of any of the merchandise which you delivered on any one day that you were employed?

A. (No answer.)

Q. Independent of reference to any other records?

A. That is all I know. I get the Navy order and I go out and pick it up and list it and take it and haul it in for shipment.

Q. I believe you testified on direct examination that all of your work which you did while you were employed as a driver, was under a Navy contract. Is that correct?

A. That is right.

Q. What do you mean by that? [257]

A. That is the only thing I worked under. I hauled strictly nothing but Navy goods.

Q. Where did you get the Navy goods?

A. We would get it from house to house. We would get it from the supply depot and take it from the warehouse to the supply depot.

Q. Did you ever deliver any?

A. Delivered a lot of it.

Q. And never in the period of time while you were employed as a driver did you ever complete any delivery

(Testimony of George W. Peterson)

or pick up any merchandise which was to be delivered within the State of California?

A. No. I picked it up at the supply depot and picked it up at the warehouse and delivered it. That was shipped into the warehouse and the goods I picked up would be from the supply depot.

Q. Then you don't know what the destination of these articles was that you either picked up or where they were to be delivered, did you?

A. Well, when we pick up an order we deliver it, yes.

Q. All right. Did you deliver it outside of the state?

A. No, not outside of the state.

Q. All right. Do you know where those orders originated from or the merchandise originated from?

A. I don't know where the merchandise originated from [258] but the orders came from the supply depot.

Q. You don't know where that particular load which you delivered to somewhere in Los Angeles area had originally come from, do you?

A. It was shipped in—

Q. Did you ever receive a shipment from Vallejo or the Navy office in San Francisco?

A. Well, I don't remember.

Q. Well, is it still your opinion that all of the merchandise which you handled was in interstate commerce?

A. It was shipped in and shipped out.

Q. You mean out of Los Angeles?

A. It was shipped in from all parts of the country.

Q. Including other parts of California?

A. Well, it could come from the northern part of California or it could come from any place.

(Testimony of George W. Peterson)

Q. Well, is it still your opinion that all of it came from without the State of California?

A. Well, our orders came from all over. I couldn't tell you that—where they come from, but they was interstate shipments.

Q. May I ask you what you mean on direct examination when you said that all of the deliveries or pickups which you made were in interstate commerce?

A. It was either leaving the state or coming into the [259] state.

Q. Upon what information do you have or do you base that all articles which you delivered came from without the state?

A. I don't remember any of them.

Q. You don't know?

A. When I worked for them they didn't do any interstate.

Q. What word is it you are using there?

A. I mean they didn't have the contract to move that in here.

Mr. Moore: Will you read the last answer?

(Answer read.)

Q. By Mr. Moore: Mr. Peterson, did you ever in the course of your driving for the company pick up a lot of household goods at one of the warehouses and take it out of storage and deliver it to some residence in this area?

A. I did not.

Q. Did you ever bring in a shipment from some individual's home for storage in one of the warehouses?

A. Well, could be for storage awaiting for shipment.

Q. Well, I asked you whether you ever did or not?

A. Well, I didn't know. My bills called for some other place. [260]

(Testimony of George W. Peterson)

Redirect Examination

By Mr. Beardsley:

Q. I did not understand your answer. You said when you worked for them they did not have a contract for interstate. Is that what you said?

A. Well, they didn't do any hauling. I don't know how you—

Q. Will you just explain what you meant by that answer? You mean they didn't send—

The Court: Let the witness explain his answer.

Q. By Mr. Beardsley: Explain what you mean by that answer.

A. Well, when I worked there we didn't—they didn't have the contract to haul it from house to house. We would pick it up—nothing only for shipping.

The Court: What did you do? What did you actually [261] do? That is the question the court is interested in.

The Witness: Well, I packed and crated or—not—I mean packed, listed and tagged.

The Court: Listed what?

The Witness: Listed all the household goods.

The Court: What do you mean?

The Witness: And hauled it into the warehouse.

The Court: What do you mean by "tagging" it?

The Witness: We tagged every piece that went in when we load it. We go out and pack the dishes, pack the bedding and we would list and tag each item like if that was a glass, we call it a glass, and if it is a chair we call it a chair and rug.

The Court: That is what you mean by "tagging"?

The Witness: That is tagging. We tag each piece that went in for shipping.

(Testimony of George W. Peterson)

The Court: Now, what do you mean by "shipping"? Did you have anything to do with shipping?

The Witness: No, sir.

The Court: What do you mean by that?

The Witness: Our order called for that. We pull it into the warehouse.

The Court: What would the order call for?

The Witness: Well, the order called for that—the goods—it would show they were to be shipped to Washington [262] or New York or whatever it called for.

The Court: Did you handle those orders?

The Witness: I handled the Navy orders and it was signed.

The Court: All right, proceed if there is any further questioning.

Q. By Mr. Beardsley: Where did the Coast Van Lines control or have possession over the goods—

The Witness: At the warehouse.

Q. And what would they go into from there?

A. They would go into the crating department.

Q. And then where did they go?

A. I don't know. I don't know where they would go.

Q. You spoke of an order for Washington, D. C. By what means would it go from here to Washington, D. C.?

A. They would get it ready and ship it out.

Q. In what? A. Well, ship it in carload lots.

Q. Did the Coast Van Lines send any of its vans across the state line into other states at the time you were working there? A. No, they didn't. [263]

(Testimony of George W. Peterson)

Recross Examination

By Mr. Moore:

Q. Upon what information do you base the fact that Coast Van Lines had no contract to do anything but Navy work while you were employed with them?

A. I said on the Navy work that I hauled them—they could have contracts with somebody else but I just worked only hauling Navy stuff. I didn't do no commercial work. I didn't haul any other goods.

Q. Well, is it your opinion that the Coast Van Lines had or did any other business besides Navy work during the time you were employed there?

A. They could have done a lot of business but they didn't—not on my work that I hauled.

Q. You don't know what they did, do you, outside of what you particularly carried yourself?

A. They didn't do any van and hauling.

Q. How do you know that?

A. Well, because I would have been in on it if they did.

Q. Well, you didn't do it, that is what you are saying, that is what your conclusion is, is that correct?

A. Well, I don't think any of them done it up to that time.

Q. I did not ask you that. Did you do any? [264]

A. I didn't do any of it, no.

Q. Did you ever see any contracts that the Coast Van Lines had? A. (No answer.)

Mr. Moore: Will you read the question?

(Question read.)

The Witness: I never seen no contracts.

(Testimony of George W. Peterson)

Q. By Mr. Moore: Do you know what Zone 1 is in the terminology of the packing business in Los Angeles?

Mr. Beardsley: That is objected to as not proper cross examination and no foundation laid and is calling for a conclusion of the witness.

The Court: Objection sustained.

Q. By Mr. Moore: I show you a contract of the Coast Van Lines and ask you to examine that.

Mr. Beardsley: That is objected to. This is a packer and not a lawyer, if the court please.

Mr. Moore: He has had wide latitude in what he said as a packer, I submit, Mr. Beardsley.

The Court: What is the point you want to bring out?

Mr. Moore: The man said there was no contract which allowed Coast Van Lines to handle intra-state movements.

Mr. Beardsley: No, I am sure he did not testify to that. He said he never saw any contracts. He said he never worked on anything but Navy work. [265]

Mr. Moore: And that was all out of the state.

The Court: Well, ask him that, Mr. Moore, and clear it up.

Q. By Mr. Moore: Do you know from any inspection you ever made of any documents of the Coast Van Lines that they did not, or did not while you were working there, have a right to engage in intra-state shipments, which means from one point to another within the City of Los Angeles?

Mr. Beardsley: That is objected to as not being within the issues and not proper cross examination.

(Testimony of George W. Peterson)

The Court: I will let him answer the question.

The Witness: I don't know nothing about that but I know that I—I do know that I didn't handle any of it and I didn't see none of their contracts.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Step down, Mr. Peterson.
Mr. Vaughn.

LOUIE VAUGHN,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Louie Vaughn. [266]

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Vaughn?

A. 3135 Larga Avenue, Los Angeles.

Q. Were you at some time employed by Coast Van Lines, the defendant in this case?

A. Yes, sir. [267]

* * * * *

Q. Now, in what capacity were you employed and tell us what your duties were?

A. When I first went to work for them I was on what [268] they called cross-country truck.

Q. How long were you on that?

A. About a month and a half or six weeks—six or eight weeks to the best of my knowledge. I don't know for sure.

(Testimony of Louie Vaughn)

Q. Did your employment on that cross-country truck terminate before or after August 21st, 1942?

A. Before.

* * * * *

Q. By Mr. Beardsley: What next did you do after you left the cross-country truck assignment?

A. I went in as a packer.

Q. How long did you continue in that employment?

A. Until I quit there December 22nd, 1945.

Q. In other words, all the time between August 21, 1942 and the date you left you were a packer?

A. That is right.

Q. Now, will you tell us just what those duties consisted of?

A. Well, a good many of the times we had what we call little packing trucks there. [269]

* * * * *

A. What we had most of the time was a small truck, what they called the packing truck. We would load that with empty boxes and barrels and go from there out to a job and pack it. The larger truck came around and followed us and picked it up. Now, that is most of the time we did that. Sometimes, why, we would ride the large truck—ride in the back end of it. They would take us out to the job part of the time.

Q. By Mr. Beardsley: What did you do out there at the place where you picked up the goods?

A. Well, we done all the packing—packed all the bric-a-brac and dishes—that is, most of the time. Now, some of that was not household goods. We didn't always pack household goods. I remember one large contract we

(Testimony of Louie Vaughn)

had—I don't know exactly how big it was, that we were over there several days and packed moving picture cameras from the Navy Department over here at the Water and Power Building—packed out different literature and stuff that they sent out—campaigns for enlistment for aviators.

Q. Do you know what your work—what proportion of your work was on Navy contract?

A. Well, I would say about one job in 20—why, we would get for something, some kind of packing. I wouldn't know what it was—just household packing. Wouldn't be a [270] Navy order on it.

Q. What about the 19 out of 20?

A. Well, it was all Navy.

Q. 19 out of 20?

A. Yes, that is my best estimate.

Mr. Beardsley: That is all. Cross examine.

Cross Examination

By Mr. Moore:

Q. Did you drive or ride on the right-hand side of the cab of that small truck you are speaking of?

A. Well, if I went on the small truck I done most of the driving.

The Court: Is that material?

Q. And someone ride with you?

A. Yes. Well, no, not always. A lot of times I was by myself—nobody with me.

Q. Did you have someone as a rule with you over 50 per cent of the time? A. I think so, yes.

Q. Was it usually the same man?

A. That is right.

(Testimony of Louie Vaughn)

Q. His name was Mr. White? A. No.

Q. Mr. Magnus? A. Yes.

Q. And you usually drove the truck and he rode with [271] you?

A. He was one of them, yes. He was with me a short time—not so awful long, though.

Q. Have you ever had a flat tire on that truck when you were out with it? A. Yes, sir.

Q. Who repaired it?

The Court: Is that material?

Mr. Moore: Your Honor, I would like to take occasion to go into it and I would like to submit to the court authorities and I will be glad to do so while we continue tests that the Interstate Commerce Commission in determining their jurisdiction over safety operations as to what these men do, whether or not they come within the scheduled provisions.

The Court: Well, it is very clear about that. There should not be even any dispute about it. It isn't what incidental work a man does; it is what the main work is that brings it under the ICC and that goes back to the safety of the conveyances. None of these men that I see are employed in providing for the safety of materials in interstate commerce by way of preparing the trucks. I have had that question argued before me at very great length, as to whether or not a man loading a truck in interstate commerce came under the provisions of the Interstate Commerce Act on [272] the theory that improper loading would make insecure the transportation of the vehicle.

Because a man gets out and pumps up a tire I do not think takes him out of one classification and puts him in

(Testimony of Louie Vaughn)

another. I will give you a ruling on it, Mr. Moore, so you can protect your record, to the effect that they are not under the Interstate Commerce Commission so far as the evidence goes at the present time.

All right, proceed.

Q. By Mr. Moore: What percentage of your time did you spend driving, Mr. Vaughn?

A. Well, let me see. I figure it would take me about an hour out to the job and back and my average would be about, say, 10 or 15 per cent of it would be driving. The rest of it would be spent on the job packing.

Q. How much of your time in loading and unloading?

A. I didn't do very much of that. I wouldn't know much about that.

Q. Any idea of what percentage of your time you spent in doing that?

A. I answered that. I don't think—I didn't do enough of it to know. I told you I just did the packing.

Q. On your way bills did you make a record of the amount of time that you drove and the amount of time that you packed? [273] A. No, sir.

Q. Did you ever supply the company with any record?

A. They used to ask about what percentage, yes.

Q. Was that put on the way bills?

A. I don't remember whether I ever put it on any of the way bills or not.

Q. Did the dispatcher usually ask that?

A. No—yes, I guess it was the dispatcher. I don't know. Somebody inquired about it there. I don't know who it was.

(Testimony of Louie Vaughn)

Q. What percentage of your time did you do packing?

A. (No answer.)

* * * * *

A. Well, about 75 or 80 per cent I imagine.

Q. Did you start in 1942 at a rate of 90 cents per hour?

A. I told you I don't know—I don't remember.

Mr. Beardsley: If you have the record I will be glad to stipulate to it, Mr. Moore. I believe the law is the employer is required to keep the record. We have tried to piece it out where these men had information or slips on the theory that your records were burned, but if you have them we will be glad to take your records. [274]

* * * * *

LEON THOMAS McCROSSEN,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows: [275]

The Clerk: State your full name.

The Witness: Leon Thomas McCrossen.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. McCrossen?

A. 5509 East 6th Street.

Q. Los Angeles? A. Yes, sir.

Mr. Beardsley: At this time, if the court please, I move for consent to amend the amended complaint to correct the spelling of the name of Leon McCrudden to Leon McCrossen. This error was made as the others were

(Testimony of Leon Thomas McCrossen)

from my attempt to read the writing of the man on his signed statement about his employment and I was in error as to the spelling.

The Court: The motion is granted. [276]

* * * * *

Q. Now, Mr. McCrossen, were you at some time employed by the defendant Coast Van Lines?

A. I was. [277]

* * * * *

Q. In what capacity were you employed?

A. I was employed as a packer.

Q. During all of the time?

A. Yes, sir. That is the man that goes out and packs dishes and bedding and personal effects in the house.

Q. Do you know whether the goods on which you worked were Navy contract orders? A. Yes, sir.

Q. Were they or were they not?

A. They were.

Q. All or substantially all?

A. Well, I would not say all but I would say what I worked on would be approximately, anyhow, better than 60 per cent that I worked on.

Q. Were you at any time employed on any line van—that is a van going between cities on any regular run?

A. No, sir.

Q. What sort of truck was it that you went out on when you went out to do this packing?

A. Well, a little Ford pickup for the first year or [278] so. All I done was taking the packing material out there and packing it.

(Testimony of Leon Thomas McCrossen)

Q. And after that, what?

A. After that a large truck called and picked it up. I went back to the office and got another order and went out on another job.

Q. What proportion of your time was in packing as distinguished from any other operation?

A. Well, now, that would all depend. You see, some jobs—you would travel a block or three blocks and sometimes you would travel two or three miles, but I would say that oh, from around 80 per cent.

Q. 80 per cent of your time was in packing?

A. Yes, packing.

Mr. Beardsley: That is all. You may cross examine.

Cross Examination

By Mr. Moore:

Q. Mr. McCrossen, if you had a packing order for two hundred pounds did you not bring that back with you on the Ford pickup truck when you returned to the warehouse?

A. Well, if I was packing for two hundred pounds—that would be very small—two hundred pounds. That would be practically one barrel and it would be very seldom. You see, I did nothing but pack. I will grant you that maybe there would be occasion once in a great while where, if I [279] had just one barrel, I would bring it back to the warehouse but most of my jobs that I was on were larger jobs.

(Testimony of Leon Thomas McCrossen)

Q. Suppose you had a thousand pounds to pack. Isn't it true you would put that on your Ford pickup and return it to the warehouse?

A. That would be very hard packing in those sixteen boxes, they call them, that run anywhere from 250 or three or four hundred pounds and packing them upstairs, for one man to load, pack them and bring them down and load them on and bring them in.

Q. No one else worked with you on the Ford truck that you operated?

A. Yes, sir. Once in a great while a man would go out to help me pack.

Q. How long would it take you to pack one barrel?

A. That all depends on what you are packing, whether your are packing very nice china or whether it is just rough goods. It runs anywhere from 20 minutes to 40 minutes to an hour or hour and a quarter. Maybe sometimes it is something fancy.

Q. You have three types of boxes—small, medium and large—that were used in the packing business.

A. Pardon me?

Q. I say, you used three types of boxes: Small, large or medium-sized ones? [280]

A. That is correct.

Q. How long did it take you to pack a small box?

A. Well, the small boxes were generally used for books and those can be packed in anywhere from 15 to 20 minutes.

Q. How long did it take you to pack a medium-sized box?

The Court: Counsel, are you getting anywhere at all with this? If it were a box that required only four articles I suppose that could be packed in five minutes. If

(Testimony of Leon Thomas McCrossen)

it is a box you could put two hundred pounds in I assume it would take a longer time. What is the point?

Mr. Moore: We would like the opportunity to question this man's credibility.

The Court: But it seems to me, gentlemen, that the court has some knowledge of the very commonest activities of an individual and when you ask a man how long it took him to pack a box I don't care what he says. If it is a five-pound box it did not take him 24 hours to pack it. I don't care what he says. If it is a two hundred pound box that is another element. Now, I do not see any reason, unless it is to be assumed that the court takes judicial notice of nothing, but a simple matter of packing a box and the questions that have been asked in this case about how long did it take you to drive to a certain place, I don't care [281] what the witness says. I know how long it should take to drive five miles or ten miles in a truck or in an automobile, approximately. I cannot tell you exactly, and no man living can tell you, unless he has made a record of it. It depends upon the fog, the traffic, the time of day and many other elements.

Frankly, gentlemen, I do not see that that is going to help the court any; but if there is something the court hasn't in mind I will be very glad to listen to the testimony. What was the last question?

(Question read.)

The Court: I don't know what a "medium" size box is. It depends on what he is packing. Just as he said, if it is china or valuable art he would have to use much greater care. If the medium-size box had nothing in it but two or three sheets and a couple of pillows I assume

(Testimony of Leon Thomas McCrossen)

it wouldn't take as long. That is what I am trying to get at.

Proceed, gentlemen.

Mr. Moore: May I then assume, your Honor, that from what has been said so far you feel it is unnecessary to pursue the question of the exception under 213-B, safety of operation of these men who have certain portions of their time devoted to driving, loading and unloading and packing? That is all that we are directing this particular examination to. [282]

The Court: I have permitted you to say what portion of these witnesses said their time was spent in driving and packing. I permitted that in every witness but now when we get into the detail of it, unless there is a specific factual situation given to the witness: "Assume you are packing a barrel of two hundred pounds of hand-painted china and glassware" and put all of those items in it that is one thing, but to say how long it will take to pack a medium-size box, in the first place I don't know what a medium-size box is and I don't know what the articles are to be packed in it, but I have permitted in every instance you to go into those things—as to how much time was spent in packing and how much in driving and I will still permit those questions to be asked in view of the theory of the defendant.

You may proceed.

Q. By Mr. Moore: What percentage of your time was engaged in loading and unloading your equipment from your truck, Mr. McCrossen?

A. I done very little of that.

(Testimony of Leon Thomas McCrossen)

Q. Can you estimate that as you have the time you spent in packing?

A. Well, the largest part of my time was spent in packing outside of driving. It would be very hard to estimate it exactly—tell you just what time it was.

Q. You cannot give us an estimation of the percentage [283] of your time you spent loading?

A. Well, as I told you before, I done very little loading and unloading.

Q. I didn't ask you how little you did. I asked you—you estimated, for example, the time you spent packing in answer to your counsel's question. You said approximately 80 per cent. What I would like to find out from you is what percentage of your time you spent loading or unloading?

A. Not over five per cent, I wouldn't say.

Q. What percentage of your time did you spend driving?

A. Well, maybe—that is hard to answer, too.

Q. I did not hear the answer.

A. That is hard to answer, too. It depends on the job you are going to, the distance you are traveling.

Q. Well, upon what information did you base your estimate of 80 per cent of your time in packing?

A. Well, I just figured about that. I would probably say the driving time might come to ten per cent, it might be fifteen per cent. It is very hard to say, to give you a definite answer on it.

(Testimony of Leon Thomas McCrossen)

Q. Well, then, your 80 per cent average for packing is not definite?

A. Well, it is very close to the time, I would say.

Q. Do you have any estimate you can give us on the [284] percentage of your time driving?

A. No, I can't.

Q. You have no estimate?

A. No definite estimate, no.

Q. Upon what information do you base your estimate of 80 per cent of it packing?

A. Well, you go out on a job and say it takes you five or ten minutes to drive to it and you are out there packing on a big job, which I was on the majority of the times, and you are there all day long. Then all you have got is your driving time back.

Q. Would you say it was the ordinary operation that you performed that kept you at one place packing all day?

A. Many a day I have packed in one place.

Q. Would you say more than 50 per cent of your time that you worked at one job packing all day with the exception of your driving time?

A. No, I would not.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Mr. Holder.

R. C. HOLDER,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name. [285]

The Witness: R. C. Holder.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Holder?

A. 1712 Maple, Los Angeles.

Q. Los Angeles? A. Right.

Q. You were employed by the defendant Coast Van Lines for some time, were you?

A. Yes, sir. [286]

* * * * *

Q. By Mr. Beardsley: Now, at what duties were you employed, Mr. Holder, when you went to work there on September 6th, 1943?

A. I was hired as a helper.

Q. And what were your duties as a helper?

A. Well, packing and unpacking.

Q. Were the goods which you handled goods under the Navy contract, or do you know? [287]

A. Yes, sir.

Q. What percentage of them?

A. Well, I handled 90 per cent Navy.

Q. Were you a helper on some sort of truck?

A. Yes, sir.

Q. What sort of truck? A. All kinds.

Q. Were you at any time on a line truck?

A. No, sir.

(Testimony of R. C. Holder)

Q. Doing interurban hauling? A. No, sir.

Q. Now, just state what kind of trucks you were on and doing what sort of work.

A. Pickups, bobtails and semi.

Q. Doing what sort of hauling or carrying of goods?

A. Packing and unpacking.

Q. I mean where were these trucks going? Between what places were they traveling?

A. In the vicinity of Los Angeles and Orange County.

Q. Were you ever employed in the warehouse?

A. Yes. [288]

* * * * *

Q. Where did you work, at what place?

A. In the warehouse.

The Court: The street address—where did you work?

The Witness: Well, I worked at 819 Maple and 1320 Margo.

Q. By Mr. Beardsley: What sort of places are those—those addresses? A. They are warehouses.

Q. Now, were you during all of the time of your employed by Coast Van Lines on trucks or were you at some time in the warehouse?

A. I was in the warehouse.

Q. How much of the time?

A. From, oh, January 5th, 1495 until July 18th, 1946.

Q. During that time what did you do—what work did you do? A. In the warehouse?

(Testimony of R. C. Holder)

Q. Yes.

A. Well, I piled furniture—what they called stacking furniture.

Q. What else?

A. Well, that is warehouse work, stacking furniture.

Mr. Beardsley: That is all. You may cross examine. [289]

Cross Examination

By Mr. Moore: [290]

* * * * *

Q. How long did you operate as a driver's helper?

A. I couldn't be exact as to how many months.

Q. That was at the start of your employment, is that correct? A. Sir?

Q. That was at the start of your employment? You started in that capacity? [295] A. Right.

Q. Can you estimate whether it was six months, one year, or two years?

A. Well, all of '43 I was helper; '44 up until October and I got hurt and then I was off three months, and then, of course, I was still on the payroll but I wasn't down at the job. January 2nd, 1945, I am pretty sure, I worked in the warehouse. I would not say how many months. Maybe two or three. And then I worked as a helper again up until September, I believe it was September or October in 1945, and the rest of the time I was warehouseman up until 1946, the 18th of July.

Q. In other words, your work as a driver's helper started in '43 and went through '44 to the time you were off for a short period? A. That is right.

(Testimony of R. C. Holder)

Q. And when you returned in January of '45 you operated as a warehouseman until the termination of your employment? A. That is right.

Q. As a driver's helper what percentage of your time did you ride in a truck? A. What percentage?

Q. Yes.

A. Oh, I could have been in one 20 per cent of my time.

Q. How much of your time would you spend loading and [296] unloading goods?

A. Oh, it could have been 20 per cent.

Q. What other duties did you perform by ratio of percentage? A. Packing and unpacking.

Q. How much of your time doing that?

A. Well, that would be 60 per cent.

Q. Your duties as a warehouseman consisted almost exclusively of piling furniture or unpling furniture within the warehouse? A. That is right.

Q. You didn't take it out anywhere and you didn't leave the confines of the warehouse nor did you load it onto trucks or do anything but pile it after it had been brought to the warehouse and unpile it in the warehouse and send it out?

A. That is right. I piled and unpiled it.

Q. How long did those things usually stay in the warehouse as an average?

A. Well, some of it would stay maybe 24 hours; some of it maybe would stay 60 days. Some of it is still there. I presume.

(Testimony of R. C. Holder)

Q. As a general rule, if it stayed 12 hours didn't it stay down on the loading platform or in the packing and crating department and wasn't put in the warehouse?

A. How is that, please? [297]

Q. I say, if it was held in the warehouse proper isn't it true it was left on the loading dock or in your packing and crating department rather than being put in the storage department of the warehouse?

A. Well, it would be set off in the crating department, yes.

Q. But it didn't come into your warehouse as such where you stored goods?

A. No. It came in at the same door but not in the same department.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Mr. White.

NOBLE F. WHITE,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Noble F. White.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. White?

A. 831 South Maple.

Q. Los Angeles? A. Yes, sir.

Q. Were you employed by the defendant Coast Van Lines [298] for some period? A. Yes, sir.

* * * * *

(Testimony of Noble F. White)

Q. And what were your duties then? What was your [299] job? A. I was a helper on the truck.

Q. And during this second period of employment, beginning early in 1945, what was your rate of pay?

A. \$1.02½.

Q. And what was your job then? A. Helper.

Q. Same thing? A. Same thing.

* * * * *

Q. Now, what did you do as a driver's helper?

A. Well, packed and loaded and hauled it to the warehouse.

Q. Were you at any time employed on a line truck, a [300] truck going between cities or states?

A. No, sir.

Mr. Moore: I am going to object to that; where the trucks went within the city or without the city is not in issue as long as it was within the state.

The Court: Objection sustained.

Q. By Mr. Beardsley: Do you know whether the goods on which you worked in these periods of employment were goods being handled under the Navy contract?

A. Well, I don't know. The driver always took care of the bills.

Q. You don't know what per cent, if any, were under the Navy contract? A. No, sir.

Mr. Moore: Objected to. The witness testified he didn't know.

The Court: Yes, he testified he didn't know.

Q. By Mr. Beardsley: Or do you know the destination of the goods, as to whether they were intra-state or interstate shipments? A. No, I wouldn't know.

Mr. Beardsley: That is all. You may cross examine.

(Testimony of Noble F. White)

Cross Examination

By Mr. Moore:

Q. Mr. White, as a rule did you work with some other [301] man more or less nearly all the time?

A. Yes, sir.

Q. What is his name? A. Key.

Q. Whatever would be the nature of the duties performed by Mr. Key, you would assist him in doing those things? Is that the usual case? A. Yes, sir.

Q. What percentage of your time would you say you spent acting as a driver's helper?

A. Well, I would help him drive. I would drive some of the time and he would drive some of the time because we were both getting driver's pay, so whichever one wanted to drive, why, drove.

Q. What percentage of your time—what percentage of your normal operating day would you say you spent driving or sitting as a driver's helper?

A. I couldn't say.

Q. How much of your time would you spend packing or unpacking?

A. Well, that would be hard for me to estimate. I don't know.

Q. How much of your time would you spend loading or unloading?

A. Do you mean that would cover the whole time for a [302] day?

Q. Yes, an average day or an average week or average month. A. Or average job?

(Testimony of Noble F. White)

Q. Average period of time over which your type of operation would be fairly routine?

A. I don't know.

The Court: He doesn't know. Proceed.

Q. By Mr. Moore: Do you know any month during the time that you have been there on the second occasion from April of 1945 to the present, is there any month that was out of the usual that would not be a typical month's operation as far as you and your associate were concerned?

A. Well, I can't recall any special month. [303]

* * * * *

DAVID GARCIA,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: David Garcia.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Garcia?

A. 1311 North State.

Q. Los Angeles? A. Los Angeles.

Q. Did you at one time work for the Coast Van Lines, the defendant in this case? A. I did. [312]

* * * * *

Q. Now, at what type of employment were you engaged—in what type of employment were you engaged?

A. Hauling freight, household goods, crated stuff.

(Testimony of David Garcia)

Q. Do you know whether or not the goods you were hauling were Navy contract goods?

A. They were. It was all Navy.

Q. Do you know whether or not they were moving in interstate commerce—that is, between states—do you know, one way or the other, about that?

A. Mostly local—local, around town. Riverside was [314] the farthest I made delivery.

The Court: You will have to talk louder so we can hear you. Do not be afraid of your voice. Read the answer.

(Answer read.)

Q. By Mr. Beardsley: You mean you did not drive further or travel further than out to Riverside, is that it?

A. Well, around Los Angeles and vicinity. The farthest that I ever went was Riverside.

Q. Did you have any knowledge about the destination to which these goods were going ultimately?

A. No.

Q. You don't know about that? A. No.

Q. Whether they were going across state lines or not?

A. No, I don't.

Q. You don't know? A. No.

Q. Or if they were goods being delivered do you know whether they came from places outside of California or not? Do you have that knowledge?

A. Well, yes, they came from out of the state into the San Pedro Naval Supply Depot. That is where we picked them up.

Mr. Beardsley: That is all. Cross examine. [315]

(Testimony of David Garcia)

Cross Examination

By Mr. Moore:

Q. Mr. Garcia, what information did you have that these goods came from out of the state?

A. Just a moment. I am sorry, I can't hear you.

Mr. Beardsley: Mr. Moore, the witness is quite hard of hearing. Would you care to approach the witness stand?

The Witness: I can't hear him.

Mr. Beardsley: He will come over near you, Mr. Garcia.

Q. By Mr. Moore: Mr. Garcia, what information do you have that the goods which you saw in San Pedro came from without the state?

A. What do you mean "without the state"?

Q. They came in from without the state I believe you testified.

A. Because I had an idea of that, because a parcel was marked from out of the state, say from New York or Chicago and so on.

Q. Everything that you handled?

A. Not everything.

Q. You don't know what percentage of the goods originated inside the state or which originated from outside the state, do you?

A. No, sir; I don't.

Q. What was your answer? [316]

A. No, sir; I haven't.

Mr. Moore: No other questions.

Mr. Beardsley: That is all. Step down. Mr. Wolf.

MORRIS WOLF,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Morris Wolf.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Wolf?

A. 2646 Redondo Boulevard, Los Angeles.

Q. Were you at one time employed by the defendant Coast Van Lines?

A. I was. [317]

* * * * *

Q. What duties were you employed at—what duties were you rendering while with Coast Van Lines?

A. Crater, crater and packing mostly—mostly house packing.

Q. Did you drive a truck at all?

A. No. I think only on one or two occasions I drove a truck. I didn't have a truck license. I didn't continue doing it.

Q. Do you know whether the goods on which you worked were goods under Navy contract?

A. Mostly all Navy.

Q. Have you any means of knowing whether they were goods which were traveling across state lines?

A. Most all of it was going out of the state. Most of it was.

Mr. Beardsley: That is all. Cross examine.

(Testimony of Morris Wolf)

Cross Examination

By Mr. Moore:

Q. Mr. Wolf, did you ever keep any record of the merchandise that you handled to determine what percentage of it went out of the state and what percentage was retained in [319] the state?

A. That is something I really wasn't interested in. I know most all of it was all out of town—out of the state.

Q. Did you ever keep any record of the amounts that went into the state or out of the state?

A. No, sir. It wasn't our place to keep any record to that effect. We just went out and done the work just as we had it.

Q. Did you have anything besides your recollection to base your estimate upon?

A. No positive proof or how much of it went out of the state and which didn't. Nobody could tell that very well except the books, but to my recollection most all of it went out of the state. While working on the jobs we always knew what was going out and what was not going out and, like I said, most of it was going out across country.

Q. Was your work very much the same all the time you were there, the nature of your operations and things which you did?

A. Practically, yes, about the same. Just going out and do the packing.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Mr. Wheeler. [320]

EARL NELSON WHEELER,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Earl Nelson Wheeler.

Direct Examination

By Mr. Beardsley:

Q. What is your address, Mr. Wheeler?

A. 1434 West 59th Street, Los Angeles.

Q. You were at one time employed by the defendant Coast Van Lines? A. I was. [321]

* * * * * * * * *

Q. Now, what change took place in your rate of pay in March 1944?

A. In March they got a new mechanic in the shop and I had a chance to be his helper and my wages was changed to 85 cents an hour.

Q. How long did that continue?

A. That continued to December when I quit.

Q. Now, before you became the mechanic's helper what sort of work were you doing the first part of the time you were employed?

A. I greased the trucks, filled the gas tanks every evening, checked the oil, and parked them on the lot and closed up.

Q. But you did not do any mechanical work, is that right?

Mr. Moore: Just a moment. I object to that as leading [322] and suggestive on direct examination.

The Court: Objection sustained.

(Testimony of Earl Nelson Wheeler)

Q. By Mr. Beardsley: After you became a mechanic's helper what sort of work did you do?

A. I helped the mechanic with all his mechanical work and I also kept gas in the trucks and changed their oil and taken them to the parking lot every evening.

Q. Do you know what proportion of your time was spent in mechanical work and what proportion in the other type of work you have described?

A. After I became helper mechanic from five o'clock on in the evening was the only time I spent gassing and checking oil and driving to the lot.

Q. Well, what proportion of the time were you doing that latter work?

A. That was only about 15 per cent.

Q. How late in the evening did you work?

A. Well, it varied. Some nights it would be seven o'clock. Some nights eight and nine o'clock. I stayed until the last trucks were in so they could be parked. Some of them I had to drive up into the warehouse where the shop was so the furniture wouldn't get wet if it was going to rain.

Q. What time were you going to work during this second period while a mechanic's helper? [323]

A. I went to work at eight o'clock in the morning.

* * * * *

Cross Examination

By Mr. Moore:

Q. Were your hours from eight to five or thereabouts when you started work in January of 1944?

A. In January to March they was from one o'clock in the afternoon until nine in the evening—that is, if all the trucks were in.

(Testimony of Earl Nelson Wheeler)

Q. One p. m. to nine p. m.? A. Correct.

Q. When those trucks came in from 1:00 p. m. to 9:00 p. m., did you ever replace a burned out headlight in them?

A. No, I never replaced a burned out headlight.

Q. Did you ever test the brakes or report the brakes as being faulty or needing adjusting?

A. No brakes, no.

Q. Did you ever make any brake adjustments during that period? A. Not until after March I didn't.

Q. Was it part of your duties from January to March, to report any mechanical deficiency which you found in the vehicles which you serviced? [324]

A. Yes. If there was something wrong I reported it if the driver didn't.

Q. Did you ever inspect the tires when they came in to see if they were either low or needed changing from the standpoint of the tread being worn?

A. Yes, sir. I checked for flats because I had to change them if they were flat.

Q. From March until December of 1944 your regular hours were, approximately, from eight to five?

A. That was the regular hours, yes, but I never got done until the last truck was in.

Q. During the day from eight to five did you use the tools of a mechanic and work with the mechanic on the trucks? A. Yes, sir, I had my own tools.

Q. Tell us the various types of work which you did upon the trucks?

A. We took the engines out of a lot of the Dodge cab-overs and rebuilt them and put them back in. Once we had to go to Wheeler Ridge and put in another engine

(Testimony of Earl Nelson Wheeler)

in one of the cab-overs that burned up; all brake repairs, changing the drums on the trailers that were broke or brakes that were worn out.

Mr. Moore: That is all.

Mr. Beardsley: That is all. Mr. Magnus. [325]

RICHARD MAGNUS,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Richard Magnus.

Direct Examination

By Mr. Beardsley:

Q. What is your address, Mr. Magnus?

A. 604 West 43rd.

Q. Los Angeles? A. Los Angeles.

Q. Were you employed by the defendant Coast Van Lines at some time? A. I was. [326]

* * * * *

Q. Now, at what type of employment were you hired—did you first go to work at? A. As a packer.

Q. And how long were you so employed?

A. Oh, approximately the whole length of time I was there.

Q. Were the goods on which you worked goods under Navy contract, do you know? A. All Navy.

Q. Do you know whether they were goods which were moving in interstate commerce or not?

A. Well, most of them were going out of the state.

(Testimony of Richard Magnus)

Q. What were your principal activities during all the time you were employed there?

A. Well, going out and packing up household goods.
Mr. Beardsley: Cross examine.

Cross Examination

By Mr. Moore:

* * * * *

Q. By Mr. Moore: Mr. Magnus, did you ever do any [328] driving while you were employed by Coast Van Lines? A. I did a little, yes.

Q. How much?

A. Oh, that would be pretty hard to say in rough figures.

Q. Did you ever do any loading? A. Loading?

Q. Yes. A. Well, I have helped load.

Q. Well, is there a difference in helping to load and loading?

A. Yes. If I were sent out to load then I would be loading for myself, but if I was out packing on the job and a truck come to pick up the load and we had difficulty, why, we would help them once in a while.

Q. Didn't you ever load articles on your truck and take them into the plant or the 'warehouse?

A. Oh, yes.

Q. Did you usually work in conjunction with someone else? A. Pardon?

Q. I say, did you work with someone else? Did someone else go with you on most of the work you did?

A. Well, I don't quite get the way you mean that.

(Testimony of Richard Magnus)

Q. All right. When you spent your time packing did [329] you go out alone or—

A. Well, I went—a lot of the times I went with somebody else. Mr. Vaughn was with me for quite a while.

Q. And did one of you act as the other man's helper?

A. Well, as a packer—not as a helper.

Q. Who drove the truck?

A. Well, the other fellow did for quite a bit, for the last nine months or so when I was with him. He was doing the driving.

Q. Did you ever do any of the driving?

A. Well, I did some driving.

Q. I believe you stated to Mr. Beardsley that all of your work was Navy business. You did no other work outside of Navy business?

A. Well, no, I would not say that exactly. I said the biggest part of my work was Navy business.

Q. Do you mean by that 50 per cent of it?

A. Oh, I would say more than that. I would say 75 per cent of it or maybe more than that yet.

Q. Did you ever keep any records of the work you did to determine how much of it was Navy or how much was not Navy? A. No, no record.

Q. Your answer is no? A. No. [330]

Q. Did you have anything outside of your memory to base your estimate on?

A. Well, I haven't got nothing as far as having papers but the company has records of all the jobs I ever went on.

Q. Did the months run about the same work?

A. What did you say, sir?

(Testimony of Richard Magnus)

Q. Did the months—the months that you were there, did you do about the same type of work?

A. I imagine so, yes.

Q. In other words, there was no month that was any different in any particular in any other month you were there? In other words, you packed or drove or whatever you did at about the same ratio or extent during the various months?

A. You mean the whole period of time I was working there?

Q. No, I mean, for example, in the month of, say of July 1943, did you do about the same type of work that you did in July of 1944?

A. Well, as far as Navy work, yes.

Q. I mean as far as the classification of the duties which you were performing without regard to whether it may have been Navy or somebody else's job that you were handling, were your duties similar during the various months [331] you were there?

A. I can't make head or tail out of that.

Q. Was there any month that you did more driving or less packing or more loading and less driving, or would your duties be fairly steady throughout the period that you were employed?

A. Well, as far as, if I understand you right—I don't know whether I do yet or not. You want to know during the period I was there, the three years, did I do more driving or helping or packing. I did the most of my time packing as a whole, as an average.

Q. We understand that. Did each month that you worked there, did you do about the same thing that you

(Testimony of Richard Magnus)

did the previous month in relation to the type of duties you performed? A. I guess I did.

Q. That would be your best recollection?

A. I don't know exactly the way you put the question that I quite understand you.

Q. Will you describe the duties that you performed? Is there any month that you worked there that you didn't do that same type of duty?

A. Well, about—I guess one month in 1944 I made a few trips to Frisco when they couldn't get anybody else to drive, if that is what you mean by different of any one [332] particular month.

Q. All right. Outside of that month in 1944 would you say that all the other months you were employed that you did similar work from month to month?

A. Yes.

Q. Now, what percentage of your time would you estimate that you spent packing?

A. Oh, about 75 per cent or 80 per cent of my time.

Q. What percentage of your time did you spend loading and unloading?

A. Well, take it over three years I would say about five per cent.

Q. How much time did you spend driving?

A. Over the same period of years would be about 15 per cent. That is including the few trips I made to Frisco.

Q. How much of the time did you spend riding as a driver's helper?

A. I can't figure all these percentages out—driver's helper or packer's helper.

(Testimony of Richard Magnus)

Q. How about driver's helper?

A. I never was a driver's helper.

Q. Did you ever ride on the right-hand side of the cab?

A. Could have been a packer.

Q. I am asking you if you rode as an employee of the [333] Coast Van Lines on the right-hand side of the cab while somebody else was driving a truck?

A. I was sitting in the right-hand side, sitting in the helper's seat, if that is what you mean.

Q. Yes. Did you ever do that?

A. I can't figure out that percentage of time. It would all depend on where the truck was going to go. It might be going only two or three streets away. Might go a half a dozen or might go a dozen. It might be one per cent or might be two per cent.

Q. Well, would you say now it was two per cent?

A. Well, I wouldn't want to say because I am not sure.

Q. Do you have any records which you kept, Mr. Magnus, upon which you base these percentages of work that you did packing, loading, driving and driver's helper?

A. No.

Q. It is all in your memory?

A. That is right.

Q. You stated in answer to your attorney's question that most of the goods which you handled were going out of the state. Is that a correct statement?

A. That is what I said.

Q. What do you mean by that? Can you give us an estimation in percentages?

A. Well, every job that we—most of them that I [334] went on up in the corner said "U. S. Navy," and you had a number on it and we had to go out and pack

(Testimony of Richard Magnus)

and crate whatever we could do at the house and then it was taken in and sent down to the supply depot and the only record we could go by is what the Navy numbers was and if it was local work it was marked "Local moving job."

Q. You had no way of knowing whether they might be going to San Francisco, Alameda, Vallejo or other points where Naval personnel were in this state, or whether they might be going to New York or Washington, do you?

A. Well, the only way I can answer that, as far as my recollection goes, most of them jobs that went to San Diego or to Frisco, the driver generally went out and packed them and loaded them and took them right away. Most of the local packers that was packing Navy or any other things as a rule did not go out on those packing jobs. Occasionally they did, so as to a figure of percentage I couldn't even say whether I went on five or went on one.

Q. What type of a truck did you use most of the time?

A. Well, the last truck I was on was a small truck, what they call a packer's truck.

Q. What kind of truck—the name of it?

A. I believe it was a Federal.

Q. What kind of body did it have?

The Court: Is that material, counsel, whether it was [335] a Cadillac body or some other?

Mr. Moore: Was it a stake body truck?

A. Half a panel and a canvas top.

Q. What percentage of the jobs that you did under two thousand pounds did you bring back to the warehouse with you?

A. Oh, I would say very few.

(Testimony of Richard Magnus)

Q. What percentage of the jobs under one thousand pounds did you bring back on your truck to the warehouse with you?

A. Let us get this straight—two thousand pounds? I don't believe the truck would hold two thousand pounds if it was household goods. If we brought anything back it would probably be just a couple of pieces.

Q. Where the packing job was one thousand pounds what percentage of the one thousand pound jobs did you carry back on your truck with you to the warehouse?

A. You say the whole job was one thousand pounds?

Q. Yes.

A. And household goods in it, a couple of beds and dressers, is that what you mean?

Q. No. You said your work was that of packing.

A. Is the whole one thousand pounds just packing material, barrels and boxes?

Q. Yes. [336]

A. Well, you could take one thousand pounds back.

Q. What percentage of the jobs which you did of packing goods where there was one thousand pounds or less did you carry them on your truck to the warehouse?

A. Well, I would say one per cent of that question because most of the people have furniture with barrels and boxes.

Q. You say one per cent?

A. You mean just bring back packing material that we packed—that is, barrels and boxes and after we packed them did we bring them back into the warehouse?

Q. That is correct. A. One per cent.

Mr. Moore: That is all.

Mr. Beardsley: Just a moment.

(Testimony of Richard Magnus)

Redirect Examination

By Mr. Beardsley:

Q. Are you sure what month it was that you made these trips to San Francisco?

A. That is pretty hard. I believe I made one trip in 1945. I am not sure of that. And it was either October 1944—it is pretty hard. I can't recall them dates.

Q. But there were more periods than one during which you made some trips, or was there just one period during [337] which you made the trips?

A. There was one period in 1944 and I am not sure whether I made one trip in '45 or not. If I did it was in the early part of '45 or the latter part of '44.

Q. Now, in your examination by Mr. Moore you said something to the effect that if the household goods were going within the state, such as to San Francisco, the driver would usually take them direct or something to that effect. Will you explain that a little more fully?

A. Well, they had what they called long line drivers that specialized in going over the highway. We had one or two trucks, I think, that used to run to San Diego and about three used to run up as far as Frisco and they had a van line haul—pack and haul—that means go to the house and pack up the household goods and load the truck to go direct. I believe in the Navy contract it is specified they had to be loaded direct. I am not too sure about that.

Mr. Moore: I object to the last voluntary statement which is not responsive and calls for a conclusion.

The Court: It may go out.

(Testimony of Richard Magnus)

Q. By Mr. Beardsley: On that type of job would you do anything about it at all? Would a packer, such as you, do anything about a job where the line driver was taking it to San Francisco?

Mr. Moore: Object to that as having been answered. [338]

The Witness: Once in a while if they didn't have any good packer on the particular truck. They kept changing help. They would send out an experienced helper to pack that for that driver.

Mr. Beardsley: That is all.

Recross Examination

By Mr. Moore:

Q. Mr. Magnus, when you went out on a job and the entire load was less than one thousand pounds, including both packed goods and any other household effects, what per cent of those did you return with you on your truck to the warehouse?

The Court: What does that meet in the case?

Mr. Moore: Strictly impeachment, your Honor.

Mr. Beardsley: I object to that.

The Court: Sustained. Here is a man testifying from recollection and from memory. Suppose you do come in and show it was 12 per cent or 15 per cent? What has that to do with it? That is not impeachment.

Mr. Moore: Suppose it is 50 per cent.

The Court: Suppose it is.

Mr. Moore: Suppose it is 75 per cent.

The Court: Suppose it is 75 per cent, suppose it is 80 per cent.

(Testimony of Richard Magnus)

Mr. Moore: Then what this man's duties were as he [339] testifies to, according to his recollection, is immaterial if the records show it is contrary.

The Court: If the record shows that it is not binding on the witness. He is not telling you he knows what it is. He is just guessing. I consider that practically none of the cross examination has helped the court a bit. The man says, "I don't know; I am guessing." The court knows he doesn't know unless he has a record. He is guessing at it for you. If you want him to guess that is all right but it does not mean anything to the court.

Mr. Moore: That is all.

Mr. Beardsley: Mr. Charette.

ALBERT CHARETTE,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Albert Charette.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address, Mr. Charette?

A. 848 South Gramercy Place.

Q. Los Angeles? A. Los Angeles.

Q. Were you at one time employed by the defendant [340] Coast Van Lines? A. I was. [341]

* * * * *

Q. By Mr. Beardsley: Now, at what type of employment were you hired at this company?

A. Packer.

(Testimony of Albert Charette)

Q. Did you have any other class of employment during the time you worked there? A. No, sir.

Q. You were a packer at all times?

A. Yes, sir.

Mr. Moore: I am sorry but I cannot hear the witness.

The Court: Speak more loudly so everybody can hear you.

Q. By Mr. Beardsley: Do you know what percentage of the goods you worked on were under the Navy contract? A. Yes, sir.

Q. What? [343] A. All Navy contract.

Q. Did you have any way of knowing whether the goods were goods moving in interstate commerce?

A. (No answer.)

Q. Had you any way of knowing that?

A. No, because everything goes to the warehouse and the office takes care of that.

Mr. Beardsley: Cross examine.

Cross Examination

By Mr. Moore:

Q. Were your primary duties a packer in the warehouse or at the residences? A. Residence.

Q. Do you have any records to base your estimate that these were all Navy contract goods which you handled?

A. Yes, sir; 95 per cent was all Navy.

Q. Do you have any records other than your memory?

A. I didn't keep no records for the Navy.

Mr. Moore: That is all. [344)

* * * * *

The Court: All right, proceed, Mr. Moore.

Mr. Moore: Call Mr. Diegel.

MAYNARD DIEGEL,

called as a witness by and on behalf of the defendant, having been previously duly sworn, testified further as follows:

Direct Examination

By Mr. Moore:

Q. Mr. Diegel, I hand you three photostatic copies of certain documents and what appears to be the original of the fourth, and ask you if you have ever seen these documents before?

A. Yes, sir; these are Navy contracts.

Q. Can you identify each of them for us?

A. This first one is contract No.—

Q. You say “the first one.” May I interrupt? You are showing me the contract numbered— [347]

A. N-244 s-31163.

Q. With a “copy forwarded” stamped in the upper left-hand corner, dated June 18, 1942?

A. Yes. That is when it was submitted for opening. It was for a period of time running from June or from July 1st, 1942, to June 30th, 1943.

Q. All right. This appears to be a photostatic copy and consisting of approximately nine pages—withdraw that. Consisting of a number of stapled pages, the back one being headed with the figure “4”, a numbered page, and says, “In witness whereof, the parties hereto have executed this contract as of the day and year first above written.”

(Testimony of Maynard Diegel)

Did you secure this from the Navy, or did you have a photostat made of it yourself?

A. Well, the Navy only had one copy of this so they sent a party from the purchasing office, an employee of the Navy.

The Court: I don't think there is any objection to the foundation.

Mr. Beardsley: No objection.

The Court: All right, it will be received in evidence.

The Clerk: Defendant's Exhibit G in evidence.

(The document referred to was marked Defendant's Exhibit G, and was received in evidence.)

Q. By Mr. Moore: Can you identify the next one as [348] another photostatic copy of a contract with the Navy? A. I can.

Q. Which is dated the 4th of June, 1943?

A. Yes.

Q. And that is a contract with the Navy Department that the Coast Van Lines had? A. It is.

Q. And which ran for a period of a year?

A. From July 1st, 1943—

Q. To? A. June 30th, 1944.

Q. And this is a photostatic copy of that contract?

A. Yes, sir.

The Clerk: Is it also admitted?

The Court: Yes.

The Clerk: Defendant's Exhibit H in evidence.

(The document referred to was marked Defendant's Exhibit H, and was received in evidence.)

(Testimony of Maynard Diegel)

Q. By Mr. Moore: The next one is dated the 1st of June, 1944. I ask you if that is a copy of the contract which the Coast Van Lines had with the Navy Department?

A. Yes. I secured this from the Navy, too.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit I in evidence. [349]

(The document referred to was marked Defendant's Exhibit I, and was received in evidence.)

Q. By Mr. Moore: What is the next document you have?

A. This is a photostatic copy of the general conditions which are made a part of all three of those contracts.

Mr. Moore: We ask by reference this be made a part of each of the three preceding exhibits.

Q. And Mr. Diegel, this is a copy of similar provisions which are attached to each of the three contracts which you have offered?

A. Yes.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit J in evidence.

(The document referred to was marked Defendant's Exhibit J, and was received in evidence.)

Mr. Moore: May we have made by reference also a part of the three preceding exhibits?

The Court: It is so understood.

Mr. Moore: No further questions.

Mr. Beardsley: No cross examination.

Mr. Moore: Call Mr. Cummins.

JAMES CUMMINS,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows: [350]

The Clerk: State your full name.

The Witness: James Cummins,

Direct Examination

By Mr. Moore:

Q. Mr. Cummins, have you knowledge of the permit which the Coast Van Lines—withdraw that.

Do you have knowledge of the permit of the Interstate Commerce Commission which the Coast Van Lines holds?

A. Yes, I have.

Q. Will you tell us what permits Coast Van Lines has or did have during the period from August 21, 1942 up to the present time?

Mr. Beardsley: That is objected to as not being the best evidence, if the court please, and also no foundation laid.

Mr. Cummins said he wasn't with the company until a date much later than the date counsel's questions refer to. It would call for a conclusion of the witness. Certainly the permits themselves would be the best evidence.

The Court: Well, do you have the permits?

The Witness: Yes, your Honor.

The Court: He does have the permits.

The Witness: May I take that back? I have reference to them, your Honor. [351]

Mr. Moore: We have a period, your Honor, in which this fire destroyed many things which occasioned our going to the Interstate Commerce Commission to get certified copies of records. This man, who was the secretary

(Testimony of James Cummins)

of the company, can tell what the Interstate Commerce Commission's office in Los Angeles says is the status of its records of permits which the company held.

The Court: Of course that would be purely hearsay and not the best evidence. With that objection confronting the court—

Mr. Beardsley: I have no objection to the proper records being put in at a later time if counsel wants to obtain them.

Mr. Moore: What records would you be satisfied with, Mr. Beardsley?

Mr. Beardsley: I have made no investigation, if the court please. I don't know what he is offering. It is perfectly clear that a statement made by an officer of the Interstate Commerce Commission is not proper evidence.

The Court: The court is confronted with that objection and has no alternative.

Mr. Beardsley: I do not want to impede Mr. Moore. If permits issued to this company are material in the case I shall not object to certified copies, certified by a proper employee of the I.C.C. I shall not require the employee to [352] be brought over here if they are properly admissible in evidence.

Mr. Moore: May I ask if the employee of the Interstate Commerce Commission, whose office is in this building, testifies from the record on file in their office, will that satisfy counsel?

Mr. Beardsley: Of course original permits could not be left here, I assume, and certified copies of any pertinent records will not be objected to on the ground there is no foundation laid for them. Certified copies I think are appropriate to prove anything that is a matter of record

(Testimony of James Cummins)

in a Federal agency of that kind. I shall not make any technical objection on that ground, on the ground that they are merely certified and not authenticated or something more formal.

Mr. Moore: A statement by an employee of the Interstate Commerce Commission's office, who will testify as to what the records in their office show, would not be acceptable?

Mr. Beardsley: I certainly object to what is now being offered to the court. I don't know how I can anticipate the form of the testimony that counsel refers to.

Q. By Mr. Moore: Mr. Cummins, since October 1944 have you had occasion to make studies of certain operations of the Coast Van Lines? [353]

A. Yes, I have.

Q. Would you state whether or not Mr. Reese here or other people assisted in the preparation of those?

A. In 1944 when we bought the company we were operating part of our business—part of our business was in connection with the Navy contracts. We were anxious to see where we stood financially—

Mr. Beardsley: Just a moment. I am going to object to this as not responsive to the question. The question is, did Mr. Retzer and other persons assist in the studies.

The Court: Objection sustained.

Mr. Beardsley: I ask it be stricken.

The Court: Listen to your counsel's questions Mr. Cummins.

The Witness: May I have the question again?

The Court: Read the question.

(Question read.)

The Witness: They did.

(Testimony of James Cummins)

Q. By Mr. Moore: Were those studies made under your direction? A. They were.

Q. Did they concern the handling of various types of operations of the Coast Van Lines?

A. Yes, they did.

Q. Will you tell us what the result of those studies [354] was?

Mr. Beardsley: Objected to as not within the issues of the case; no proper foundation laid and not the best evidence and immaterial as far as the question shows up to this point.

The Court: I think counsel can make it a little more specific without objection.

Q. By Mr. Moore: What particular ground, Mr. Cummins, did the series of studies cover? What was the first one that you covered?

A. Covered the cost of the individual services that were done to perform any one service of the Navy contract.

The Court: We are not interested in that.

Mr. Beardsley: And it is not within the issues, if the court please.

Q. By Mr. Moore: Did it disclose the time element involved and the work performed? A. Yes, it did.

Q. What were the other studies besides the first one?

A. Studies related to the cost of time that trucks were in operation to bring in household goods, varying in weight from 500 pounds to 10,000 pounds.

(Testimony of James Cummins)

Q. Were those based upon actual observation of the operations as such?

A. Yes, they were. The survey was supervised by [355] Mr. Retzer, who at that time was operating manager of our company.

Q. What other studies did you make?

A. We made further studies to determine how long it took to pack barrels and boxes, how long it took to handle a small shipment of 500 pounds or 1,000 pounds or 2,000 pounds, all leading up to a point of making it clear in our own minds if it would be—

Q. We do not care for what purpose or what you eventually did with the figures, whether Navy contract or otherwise. I just want to know what the studies made consisted of.

Now, with regard to the first study, referring to the small shipments, can you tell us what the analysis and result showed with the time factors involved and the operations of your personnel handling the shipments of 500 pounds or less of household goods to be packed and handled in the ordinary course of events?

Mr. Beardsley: That is objected to as not within the issues, if the court please, and not material.

The court: I will permit the question.

Mr. Beardsley: May it please the court, may I have an opportunity to ask one or two questions on voir dire?

The Court: Yes. [356]

(Testimony of James Cummins)

Voir Dire Examination

By Mr. Beardsley:

Q. Mr. Cummins, how closely were you associated with the making of this study about which you are now to testify? A. Very closely.

Q. Were you here in Los Angeles while it was being made?

A. A good portion of the time—not all of the time.

Q. Did you actually look at any of the original source material and note down— A. Yes.

Q. The answers to the questions you were pursuing or did Mr. Retzer supervise that and you have only indirect supervision over him because you were secretary of the company?

A. Well, I don't know what jurisdiction I had over him. I told him I wanted to have a study made of the cost of performing these different operations that we were conducting and I knew that some of them were not profitable and he did give me some figures which I did not agree with him and asked him to re-study them again.

Q. But he actually looked at the way bills or whatever the original source of materials were and reported to you what he found, did he not? You didn't go through the [357] bills one by one and make this report, did you?

A. Yes; we still have them.

Q. You say he did that or you went through the bills, the original entries or records and made the report? Mr. Retzer did it or you did it?

A. He was the one asked to make the report. I checked some of the figures he gave me and didn't agree with some of them and after checking them myself—

(Testimony of James Cummins)

Q. And then had him do it over, is that right?

A. Yes, if there was some point I didn't think was logical or right I asked him to recheck it.

Mr. Beardsley: Well, I make the further objection, if the court please, this witness is not the one best qualified to testify. It is a summary, apparently, of a report made from original materials by somebody else.

The Court: I think the objection goes more to the weight of it. Proceed.

The Witness: What was the question?

(Question read.)

The Witness: The conclusions that we reached in the handling of these shipments, and I am not referring particularly to Navy but to our private work as well, on our overall operation that it was not profitable for us to prepare small shipments for—

The Court: We are not interested in that at all. [358]

The Witness: I didn't answer it right. I know the answer to it.

Q. By Mr. Moore: What are the factors that went into your decision such as what was disclosed by your study as to the time it took to drive, load, unload, pack, unpack, load—

The Court: Just think of that question now and answer it the best you can.

The Witness: In other words, you want to know what our conclusion was as a result of the study that was made or what we had learned?

Q. By Mr. Moore: What did you find out from the study you made with relation to how much time it took for a man who was a packer to take his truck and go out and pack and load the merchandise on the truck and return

(Testimony of James Cummins)

the truck to the warehouse, unload the merchandise and complete the operation?

A. The conclusion that we reached on it was that where small shipments were involved it would be better and more profitable for us to have the packer go out in his truck, pack it, load it onto the truck, and bring it back into the warehouse. In other words, he would act in three capacities for that job and not as a packer particularly. He was a piece of everything.

Q. Now, just to go one step behind that. What led [359] you to that conclusion, Mr. Cummins? What study of the time element involved, how long did it take to do the component parts of the study which you made?

A. On smaller shipments the greater portion of the time or a goodly or substantial portion of the time was involved in a truck going from and to the job and it didn't pay us to do that.

The Court: We don't care about profits. We are not going into that. We are not going to examine the financial statement of the company.

The Witness: I know what I want to say.

The Court: You have answered counsel's question. Ask another question.

Q. By Mr. Moore: On the next larger shipments which you analyzed what did it show with regard to one thousand or two thousand pounds as to the time element divided between driving and loading and packing, unloading and return driving?

A. You want to get the conclusion again?

The Court: That is right.

Q. By Mr. Moore: That is right.

(Testimony of James Cummins)

The Witness: The conclusion we came to was that a particular type of truck which we had in our warehouse was best suited to handle shipments between one thousand and two thousand pounds and for that reason particularly or special [360] crews were assigned to that particular truck that would do the operation of going to the house, doing the packing, loading it, pack merchandise including what miscellaneous furniture there was and bringing it back to the warehouse and substantially we tried in our operation to confine it to that particular truck, to do that type of work. There were occasions, of course, when it wasn't done, but in the majority, as our records will prove, that was done.

The Court: Ask the next question.

Q. By Mr. Moore: In the case of one thousand pounds of merchandise what were the time factors that you found for each of the component elements of your customary operation?

Mr. Beardsley: That is objected to, if the court please. It doesn't appear that was one of the matters within the study and the same objection I made before, this man did not refer to the source material.

The Court: Well, I will see what he can do with it. Repeat the question.

(Question read.)

Q. By Mr. Moore: Did you have so many hours consumed for each one of these operations?

A. Yes.

Q. Can you tell us—did you make a summary of those? Did you arrive at a study that gave you an answer to those elements? [361]

A. Yes, we do have.

(Testimony of James Cummins)

Q. Well, what are they?

A. May I answer the question, your Honor.

The Court: It is very clear.

The Witness: This man will object to my answer.

The Court: Go ahead. I am the one taking care of that. You go ahead and answer the best you can.

The Witness: You want to know about a shipment between one thousand and two thousand pounds?

Mr. Beardsley: The question referred to one thousand pounds.

The Witness: One thousand pounds? Approximately, on a one-thousand-pound shipment, approximately 25 per cent would be consumed in driving time going to the job. Probably forty per cent or forty-five per cent in packing; five to ten per cent in loading and from that house he would go on to the next job so the driving time would not be the same as it was going out to the warehouse. In other words, he had a series of jobs for that particular day which our records will substantiate.

Q. By Mr. Moore: Now, do you have sample studies that were made on individual cases such as a pickup in a particular community, the job done and the time consumed in doing the various jobs?

A. Yes, we do have. [362]

Q. Can you give me one of those exact studies?

Mr. Beardsley: May we inquire whether they are prepared under the same conditions as stated before, or prepared for the purpose of this testimony?

Mr. Moore: The same conditions as testified to before.

Mr. Beardsley: Is that your answer, Mr. Witness?

The Witness: I haven't answered.

(Testimony of James Cummins)

Mr. Beardsley: These were not prepared for the trial but prepared in the early study by Mr. Retzer.

The Witness: Yes, sir; that is right. Now, can I answer the question?

Q. By Mr. Moore: Please, sir.

A. This is a typical shipment of 1300 pounds which was from Altadena, coming to the warehouse to be packed and shipped. The delivery of the materials, the preparation to go to work for two men was two and a quarter hours. The packing materials they took with them were two barrels and three large boxes. It took them one-half hour to do the listing.

Q. May I interrupt? The first item you gave, did that preparation—delivery of materials to residence, that means getting materials and going to the residence?

A. That is correct.

Q. The driving time?

A. Correct; the packing at the house for two men was [363] one hour. The loading at the—the tagging and listing of the loading was a half hour for one man loading at the residence and for two men was three-quarters of an hour. And the return to the warehouse of the packers and the van with two men was one and one-quarter hours. The unloading and checking at the dock was three men a half hour.

Now, I could continue on.

The Court: What do you mean by the “dock”?

The Witness: That is at the warehouse, your Honor.

The Court: The warehouse dock?

The Witness: Yes, sir.

Q. By Mr. Moore: Do you have any other sample studies made besides the one which you just referred to?

(Testimony of James Cummins)

A. Yes, sir; we do have.

Q. What is the next one your study shows?

A. The next one is a shipment of 492 pounds from Pasadena, coming into our warehouse to be ultimately shipped—

Q. What does it show were the necessary or component elements of the job done by the men who handled that job?

A. It showed there were two men on the job. One hour was consumed in going to the residence and preparing their materials at the warehouse. They took with them one small box and one large box and the house packing time for two men was a quarter of an hour. It took them a quarter of an hour to tag and list the merchandise, a quarter of an [364] hour to load the merchandise on their truck and it took them three-quarters of an hour to return to the warehouse, and unloading and checking at the dock was one hour.

Q. Now, have you any other sample studies which you made?

The Court: Just a moment. We will take a short recess.

(Short recess.)

The Court: You may proceed. Mr. Moore, can you give me any idea as to how long it will take to hear your testimony?

Mr. Moore: I think the afternoon should complete our case.

The Court: All right. We will take a recess until two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was had until two o'clock p. m. of the same day.) [365]

Los Angeles, California, Tuesday, October 29, 1946,
2:00 P. M.

The Court: You may proceed.

Mr. Moore: Your Honor, we have submitted to counsel a resume of the periods of employment of all employees, some of whose cases have not been put in and at the wish of counsel for the plaintiffs we will tender a stipulation on those who have presented their matter to the court. This is a summary of the weeks and an agreement that overtime is five and a half hours and the hourly pay and the amount in dollars and cents for the extension of the weeks at five and a half times the current rate.

Mr. Beardsley: Do you wish to file it with the court? I think we would want to check it a little against our notes and the testimony, but assuming it is correct—Mr. Diegel prepared this computation and it apparently was made in accordance with the stipulation which eliminated the testimony about the number of hours per week right straight through, adopting the flat formula of five and a half hours per week.

We will check it, and it is our agreement, of course, that that goes in in place of the testimony.

Mr. Moore: And that all these other exhibits in evidence for identification will be withdrawn to prevent the accumulation of the record and offer this in evidence for the men whose cases have been presented. [366]

The Court: Very well.

The Clerk: Defendant's Exhibit K in evidence.

(The document referred to was marked as Defendant's Exhibit K, and was received in evidence.)

* * * * *

JAMES CUMMINS,

called as a witness by and on behalf of the defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Moore:

Q. I hand you a copy of an order, Motor Carriers 34278, dated the 19th day of September, 1938, and ask you if that is a copy of the application and permit of the Coast Van and Storage for certain interstate rates in the area of Los Angeles? [367]

Mr. Beardsley: In the first place, I object to it. No foundation has been laid. This of course is six years before Mr. Cummins' connection, and this appears to be a certified copy. I object to it as not the best evidence as to either the application or the order. It is the same point we raised this morning. This is merely a mimeographed sheet which appears to have been torn out of some kind of book, perforated book.

Mr. Moore: I further state this is a copy taken from the files of the Los Angeles office of the Interstate Commerce Commission, submitted to Mr. Cummins by the office of the Interstate Commerce Commission as their file copy of the operating right issued to the Coast Van Lines.

Mr. Beardsley: I object to all of the statements as being merely a statement of counsel and not evidence, and this is not the best evidence of what the order of the Commission may have been.

The Court: The court is interested in the time. It is not within the issues, is it, Mr. Moore?

(Testimony of James Cummins)

Mr. Moore: It runs indefinitely, your Honor, from the issuance—

The Court: Then I think some showing of that kind should also be in the record. However, I will let it in. It speaks for itself.

The Clerk: Defendant's Exhibit L in evidence. [368]

(The document referred to was marked as Defendant's Exhibit L, and was received in evidence.)

Q. By Mr. Moore: I hand you a copy bearing the seal of the railroad Commission of a permit to operate as a city carrier, and ask you if that is a copy of a permit issued to you by the Railroad Commission bearing the official seal?

Mr. Beardsley: That is objected to as not being within the issues of the case. This hasn't anything to do with the Motor Carrier Act. This has to do with the California Railroad Commission.

Mr. Moore: Under the City Carriers' Act. The rights are existent in a city carrier to carry goods in interstate commerce under that franchise. In other words, we are receiving or terminating any shipment in the area in which they are operating under the so-called Los Angeles commercial zones and the City Carriers permit by decision which we will submit to the court in argument, which is found in 3 Motor Carriers, Case 248—that it is a zone in which the Interstate Commerce Commission has power to regulate but which under the franchise given by the State of California grants them the privilege of operating in that capacity as a terminal or as a carrier of goods at the end or start of an interstate commerce movement.

(Testimony of James Cummins)

Mr. Beardsley: My objection is the issuance of a permit [369] by the State of California. It has nothing to do with the issues in this case, as to whether or not the employees or these particular plaintiffs were subject to the regulations of the Interstate Commerce Commission. Therefore, it is not material.

The Court: Let me see the permit.

(Document handed to the court.)

The Court: I will let it in.

The Clerk: Defendant's Exhibit M in evidence.

(The document referred to was marked Defendant's Exhibit M, and was received in evidence.)

Mr. Beardsley: What is the date of the document just admitted?

Mr. Moore: The permit to operate as city carrier is dated the 3rd of February, 1942.

Q. By Mr. Moore: I show you a document bearing the title, Railroad Commission, permit to operate as a radial highway common carrier, dated the 3rd of February, 1942, bearing the seal of the Railroad Commission, and ask you if that is a copy of the permit issued to you for that operation? A. It is.

Mr. Beardsley: The same objection.

The Court: In evidence.

The Clerk: Defendant's Exhibit N in evidence. [370]

(The document referred to was marked Defendant's Exhibit N, and was received in evidence.)

Q. By Mr. Moore: Mr. Cummins, directing your attention to the survey which we were discussing prior to the noon recess, I believe you had shown me one of the

(Testimony of James Cummins)

summaries of that survey. Can you point it out to me, please? A. This 2202.

Q. It shows upon your statement here the breakdown of the hours, preparation and delivery of materials to residents, driving time, Altadena, California; house packing, tagging and listing time; loading at the residence, return to the warehouse. And in the lower right-hand corner I see time for packing and listing of two barrels and three boxes and ask what those two refer to? Are those materials used on the job?

A. That is correct.

Q. And a notation "2 man hours." A. Yes.

Q. Under the heading of hours there appears for preparation and delivery at residence one hour and a quarter, house packing one hour, tagging and listing one-half hour, loading and residence three quarters of an hour. Return to warehouse one hour and a quarter. Are those the figures that resulted from your study of this particular case? A. They are. [371]

Q. The next one, which is No. 2259, which is designated 146 North Parkwood, Pasadena, and under the heading of preparation, delivery of materials to the residence, time was one hour. House packing was one-quarter of an hour.

Mr. Beardsley: This is objected to on the ground it is all in evidence. I have all these figures in my notes from this morning. Please refrain from repeating matters already in the record.

The Court: But counsel may have some other point.

(Testimony of James Cummins)

Mr. Moore: And in the lower left-hand corner there is an itemization of one small box, one large box; time packing itemized, one-half hour?

A. That is right.

Q. Does this item in the lower left-hand corner, "One large box and one small box" indicate the materials that were used in connection with this job? A. It does.

Q. Another study, numbered 2257, under preparation, delivery of materials, an hour and a quarter. House packing one hour and a quarter. Tagging and listing one-half hour. Loading at residence one hour. Return to warehouse one hour. Loading and checking at dock one hour. In the lower left-hand corner of this document appears a notation of time, packing two large boxes, one medium box, one and one-quarter [372] hours. Does that represent the equipment that was used in that job?

A. It does.

Q. Now. No. 2262, there is a preparation and delivery of materials and other items in the left-hand corner. There is the time packing showing 8 barrels, two large, three medium and four small, referring to boxes?

A. That is right.

The Court: Counsel, is this going to be tied in to meet some of the specific plaintiffs in the case, is it not?

Mr. Moore: This, your Honor, will be followed by Mr. Diegel, who has prepared a study on these records, showing in addition to what they have previously determined to be time factors, the use of those time factors in connection with a study of jobs over a period of weeks which indicates the amount of time consumed in driving and loading as compared with packing in opposition to the

(Testimony of James Cummins)

testimony of these men as to what time was consumed in those functions.

The Court: As to each plaintiff?

Mr. Moore: Yes, as to each plaintiff.

The Court: Otherwise it would be immaterial. Suppose there is no showing in the testimony given now that it is in any way connected up with these plaintiffs; it might have been jobs done by men who are not here or who had quit and, of course, then it would not be applicable at all to meet [373] any of the testimony or estimates given by these plaintiffs. You may proceed as long as it is going to be connected up.

Mr. Moore: It is with relation to the time consumed in connection with the barrels and boxes which were used and by an application of the studies the use of the equipment which appears in each of the studies of the individual men to prove the loading and driving as compared with packing time in similar cases.

The Court: Well, these figures here will be connected up with some of the plaintiffs, will they not?

Mr. Moore: These figures will be connected up from the standpoint of showing from the study made by the actual application of the amount of equipment and other items which have been used to determine the hourly basis upon which these averages apply, so when Mr. Diegel presents a study based upon the individual way bills for each man, we have then some basis to indicate what is the reasonable time for the amount of equipment used in each one of these cases.

The Court: But I do not believe this testimony is going to help the court. I am just trying to reach out and find something that is going to help the court in its

(Testimony of James Cummins)

decision. As I see it, this does not apply to a specific plaintiff.

Here a man gets on the stand and says, "I did so and so, and I took so much time." Now, that in the court's opinion, cannot be met by saying, "Well, at another [374] time some other man at some other place or under different circumstances" did certain things. That would be a generalization and I do not see how it is going to help the court.

Mr. Moore: Item No. 2262, for the equipment used there were six man hours spent in packing time?

A. That is correct.

Q. In a study of your operations over a three-months period in the year 1945, what percentage of the packing and crating work did you do? Was it done for loads or jobs running from one to 500 pounds? A. It was.

Q. What percentage of your—

Mr. Beardsley: There is no foundation laid, if the court please, for this sort of testimony. This man obviously isn't the one who prepared the studies and no reference is made to any original record. I object to it on the ground no proper foundation is laid and the further ground that the matter is not probative of any of the issues in this case. The percentage of their work which had to do with smaller or larger shipments hasn't anything to do with the issues in this case or doesn't establish at all what any one of the plaintiffs was doing at any particular time.

The Court: Well, it goes to the weight. Continue, Mr. Moore.

(Testimony of James Cummins)

Mr. Moore: We will call Mr. Diegel. [375]

The Court: Any cross examination?

Mr. Beardsley: Yes, if the court please.

Cross Examination

By Mr. Beardsley:

Q. Mr. Cummins, did you see any of the original records from which these summaries were made?

A. Yes.

Q. You did see them? A. Yes.

Q. Then these numbers which you have referred to, such as 2202 and then the next number in sequence is 2257, did those refer to way bill numbers?

A. Those numbers refer to our file on these particular jobs. It is a Navy number.

Q. So that you took as one sample a job No. 2202 and then the next sample serially of the jobs you had was 2257, is that correct?

A. Whatever number is on there.

Q. Well, now, isn't that correct? It jumps from 2202 to 2257? You have studied none of the ones in between, apparently. A. That isn't so.

Q. It is not so? Why did you pick these particular ones out, one in Altadena and one in Pasadena of all the work [376] you were doing?

A. Could have picked any one just as well as those.

Q. You picked them at random and happened to get three in Pasadena and one in Altadena, is that correct?

A. That is right.

Q. Aren't those rather long hauls, compared with the general business being done by the Los Angeles company?

A. I wouldn't say so.

(Testimony of James Cummins)

Q. You did not happen to pick out any that were in the Los Angeles area?

A. Yes. I have some. We have them from all over.

Q. Now, isn't it true, Mr. Cummins, that when a man goes out, for example, to Pasadena, to do a job of packing normally he would do some other jobs in the same general vicinity and not have travel time from the Coast Van Lines out to each of the jobs?

A. Yes, many times.

Q. These all show travel time all the way, however, from the plant to the job, don't they, and all the way back—each of these studies?

A. I could not say as to that but I could—

Q. Could you say by looking at them if that is not true?

A. I could mention further to you—

Q. Just a moment. May I have an answer to the [377] question? Can't you tell by looking at these that actually you picked out instances where you charged the full driving time out to and back from either Altadena or Pasadena as the case may be?

Mr. Moore: Just show them to the witness, Mr. Beardsley.

(Mr. Beardsley handing document to the witness.)

Q. By Mr. Beardsley: For example, you are pointing now to No. 2262, in which you charged for return to warehouse one hour and a half?

A. That is right.

Q. Now, certainly that isn't—that is the charge you made in time for the use of the van and two men driving from that job to the warehouse?

A. That is correct.

(Testimony of James Cummins)

Q. And on the same one you have a trip to the place where you picked it up? A. Yes, sir.

Q. Will you show me where it is?

A. Yes, right there.

Q. What is that time?

A. One and a quarter hours.

Q. So on this particular job that you have picked out as a sample you have two hours and three-quarters of driving time for a job in Pasadena, is that right?

A. That is right. [378]

Q. Now, isn't it clear to you from that that includes a full charge for driving to the job from the Coast Van Lines and back to the Coast Van Lines? It isn't a case where you only charged the time from some other job in Pasadena over there, is it?

A. On this particular job that was all that was done.

Mr. Beardsley: Will you read the question?

(Question read.)

The Witness: I thought you asked me—you had better read it again.

Mr. Beardsley: Let me rephrase it.

Q. On this job there was charged to this particular job full time of going from Coast Van Lines to Pasadena and from Pasadena to Coast Van Lines, is that correct?

A. That is right.

Q. Now, isn't it true that on many occasions, particularly where you are picking up small shipments, the man in the truck packed one or two or three jobs in Pasadena so the driving time between jobs is quite short, compared with this charge of time? A. That is correct.

Q. Now, let me ask you—you say this is often the case—

(Testimony of James Cummins)

Mr. Moore: Did you finish your answer? [379]

The Witness: No, I did not. Can I ask him a question?

The Court: You cannot ask a question but you can explain your answer.

The Witness: To explain my answer. That was the very thing I was going to submit in the next exhibit and point out to you that we did do the very things you want me to say we did.

Q. By Mr. Beardsley: I don't want you to say anything.

A. That we consolidated jobs. That is what Mr. Moore's exhibit over there was for that you objected to, so we could give the court a clear overall picture of our operation.

Q. Is that your explanation?

A. May I say one more thing?

Mr. Beardsley: If the court please, I don't know what the witness refers to—evidently some exhibit. I believe those were all admitted.

The Court: We let them all in.

Mr. Beardsley: My recollection is that we did and the witness turned over to me for cross examination. Now, what I want to ask Mr. Cummins is this:

Q. Is there any one of those jobs about which you have testified where there was the charge merely from another place in the same general vicinity to that job? [380]

A. On these particular ones, no.

Q. That is what I wanted to ask you. Thank you.

Now, is it or is it not a practice of your company, or was it not a practice during the period we are talking about, to charge on some jobs full time, driving time to

(Testimony of James Cummins)

and from the job although the truck and men may have done other jobs in the same neighborhood?

A. I couldn't say as to that.

Mr. Moore: Objected to as not within the issues.

Mr. Beardsley: Well, he said he couldn't answer it so there is no use arguing that point.

Q. Don't you know as a matter of fact that the entries on the way bills of driving time are often made by some employee in the warehouse and not by the person on the truck himself? Do you know that? Yes or no.

A. What was the question?

Mr. Beardsley: Will you read the question?

(Question read.)

A. I would not say they were often made but they were sometimes made.

Q. In other words, the driver or helper on the truck did not always enter the time but sometimes it was entered after the way bill came back into the plant, isn't that correct?

A. No, that is not so. [381]

Q. Is that sometimes what is done?

A. Sometimes.

Mr. Beardsley: That is all.

Redirect Examination

By Mr. Moore:

Q. Mr. Cummins, if a driver or helper failed to make an entry on the way bill was it the custom of the dispatcher when he returned to the place, to inquire as to what the information was and place it on the way bill?

A. It is.

The Court: Now, counsel, that is an absolutely leading question.

(Testimony of James Cummins)

Mr. Beardsley: Will you read the question?

(Question read.)

Mr. Beardsley: Objected to.

Mr. Moore: The question is withdrawn.

Q. Mr. Cummins, on the item just referred to by Mr. Beardsley, will you tell us whether or not the merchandise, where they packed it was in turn put on the same truck and brought back to your warehouse? A. It was.

Q. What instructions are given to drivers with regard to entries to be made upon way bills?

Mr. Beardsley: That is objected to until the proper foundation is laid and connection is made with these [382] plaintiffs and with this period involved.

The Court: It is immaterial what instructions were given. Suppose they gave them instructions and they didn't follow them? It is what they did and not what they were told to do.

Mr. Moore: That is all.

Mr. Beardsley: That is all, Mr. Cummins. My two men are here now, Mr. Moore. Would you like for me to put them on?

Mr. Moore: All right.

Mr. Beardsley: Is that satisfactory to your Honor?

The Court: Yes.

Mr. Beardsley: Mr. Fisher.

KING FISHER,

called as a witness by and on behalf of the plaintiffs,
having been first duly sworn, was examined and testified
as follows:

The Clerk: State your full name.

The Witness: King Fisher.

Direct Examination

By Mr. Beardsley:

Q. What is your residence address?

A. 121½ West 36th Place.

Q. Were you employed by the Coast Van Lines at
some time? [383]

A. Yes, sir. [384]

* * * * *

Q. Now, what were your duties during the first period
you worked there?

A. Well, I was hired out as a packer, Navy packer.

Q. Do you know what proportion of the goods you
worked on were under the Navy contract?

A. As near as I know, yes.

Q. What proportion of them were?

A. Oh, I should 80 or 90 per cent.

Q. Do you know what proportion of them were going
in interstate commerce, between the states?

A. No, I don't know. I wouldn't have no idea of
that.

Q. Now, in the second period what were your duties?

A. The same thing, packing.

(Testimony of King Fisher)

Q. And what was the fact in the second period regarding [385] Navy goods, Navy contract goods?

A. The same line.

Mr. Beardsley: Cross examine.

Cross Examination

By Mr. Moore:

Q. When you started your employment, Mr. Fisher, were you acting as a packer at that time?

A. Yes, sir. [386]

* * * * *

Q. What percentage of your time did you spend packing?

A. Oh, I don't know how you could figure that. We drive out to a job and pack it and when you get it packed you were through with it.

Q. What percentage of your time did you spend driving?

A. Depends on where we was going at. Different times one place and another time another place. Maybe it would take an hour and a half to go out there and maybe the next place take you 40 minutes. Maybe the next one 30 minutes.

Q. What percentage of your time did you spend loading?

A. Well, that all depends on the job, too.

Mr. Moore: That is all.

Mr. Beardsley: Mr. Smith. [387]

SIDNEY A. SMITH,

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Sidney A. Smith.

Direct Examination

By Mr. Beardsley:

Q. What is your address, Mr. Smith?

A. What?

Q. Your residence address?

A. 949 East Hyde Park.

Q. What city? A. Inglewood.

Q. Were you employed by Coast Van Lines, the defendant in this action, at some time?

A. Yes, sir. [388]

* * * * *

Q. By Mr. Beardsley: Now, what were your duties during your period of employment there?

A. Well, I hired out as a packer and then I was a packer and driver and—

Q. What sort of driving were you doing? On what sort of hauls?

A. Oh, I was on that Navy—that flat truck on the Navy hauling from Long Beach, going from here to Long Beach all the time—hauling Navy freight.

Q. During what period were you doing that?

A. I couldn't tell you what period but I done it for about a year.

Q. How long were you employed as a packer?

A. Well, I don't know how you classify that. I hired out as a packer altogether, would you call it?

(Testimony of Sidney A. Smith)

Q. How long was it you did that work before you started driving back and forth to Long Beach?

A. Oh, I would say about four months.

Q. And then was it after that first four months period that you began driving back and forth to Long Beach?

A. Yes, on the freight truck.

Q. Flat truck? A. That is right.

Q. Between what points were you driving? [390]

A. On Main Street and Long Beach.

Q. At what place at Long Beach?

A. I think it was 2066 Santa Fe, where the Coast had their place down there, and from there to the Navy Supply Depot, and picked up stuff there all the time.

Q. Now, what did you do after that year?

A. Well, I done just, mostly everyone of the rest of them. I packed and drove and helped and everything else.

Q. During all the rest of the time you were with the company? A. That is right.

Q. Do you know what your classification was?

A. Packer.

Q. What were your principal duties aside from that year that you drove back and forth to Long Beach?

A. Well, what do you mean?

Q. What did you spend the majority of your time doing?

A. Well, we spent about—a lot of it in packing and a lot in driving and a lot in loading. You see, we would go out on a truck and we would pack it and load it and bring it in.

(Testimony of Sidney A. Smith)

Q. Do you know what percentage of your time was spent in each of those activities?

A. That would be hard to say. I would hardly want to say that.

Q. Do you know what proportion of the goods you worked [391] on were goods handled under the Navy contract?

A. Do you mean in freight or all together?

Q. When packing particularly?

A. (No answer.)

Q. What was the proportion?

A. Well, I would say it was about 50-50 anyway.

Q. Of the part which was not under Navy contract?

A. No, that don't include that.

Q. Well, what I am asking you now, is, what proportion of the goods you worked on was under the Navy contract and what proportion was other business of the company than Navy?

A. Well, I never did much other business outside of Navy.

Mr. Beardsley: Cross examine.

Cross Examination

By Mr. Moore:

Q. Were you doing the same type of work that you described in January of 1945, driving and packing and loading?

A. I think it was, yes, sir.

Q. And the same thing in March 1944?

A. Well, in '44—'43 I think is when I was driving the flat truck for the Navy altogether so I don't know just how long it were. Otherwise from—

(Testimony of Sidney A. Smith)

Q. In January of '44 were you carrying on this typical operation of driving and packing and loading? [392]

A. Yes; that was the same thing.

Q. In March of 1944 were you carrying on a typical operation of driving, packing and loading?

A. Now, you got me. I don't know. When I went back home in March I was gone about five months, I think. If you have the record there you can tell because I don't remember just when it was. It might have been March when I went back to Omaha, and I came back in the last of July, I believe it was when I left Omaha. That is when I went back to work for the Coast.

Q. What year? A. '44.

Q. Well, after you left your driving job in Long Beach whatever other periods of time that you were employed by the Coast Van Lines, did you do the typical work of packing, driving and loading?

A. That is right.

Q. There wasn't any particular period that you did any more loading or packing or driving in one month or another? A. That is right.

Q. It all run about the same?

A. That is right.

Mr. Moore: That is all.

Mr. Beardsley: That is all, Mr. Smith. [393]

Mr. Moore: Do the plaintiffs rest?

Mr. Beardsley: Yes.

Mr. Moore: Call Mr. Diegel.

MAYNARD DIEGEL,

called as a witness by and on behalf of the defendant, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Moore:

Q. Mr. Diegel, in reference to the plaintiffs in this case, have you made an examination of the records to attempt to reduce certain facts concerning their functions?

A. I have.

Q. For the purpose of that will you tell us what documents and source of reference you have gone to for it?

A. Our purpose was to show the court the actual time spent on the various jobs and to do this we have taken the original sheets from what we call our cartage book. It is a book on which the dispatcher enters all of the orders for each day.

We have taken this sheet and determined by information written on it, written on it by the dispatcher or information written on other documents, such as the way bill or packing lists, who did each job. We have eliminated the names of the men that were not involved in this suit and just [394] taken the ones that we have heard in this case.

The other documents that we have used to support this study are the way bills pertaining to each individual case and billings, such as invoicing to the Navy, with supporting papers, and other documents that pertained to each individual case, bringing out the information that we wanted to set forth.

To do this we have taken what we call a week of days. We have started with a Monday, July 2nd, 1945. We

(Testimony of Maynard Diegel)

picked July because we had already pulled quite a number of—quite a quantity of our records and had them out and available. It seemed as good a month to us as any, inasmuch as the volume there was a very good average. It wasn't low or it wasn't high. So, we took this week of days, starting, as I say, with Monday, July 2nd—

The Court: ' What year?

The Witness: 1945, Tuesday, July 10th, 1945, Wednesday, July 18th, 1945, Thursday, July 26th, 1945, and Friday had to be in August, the 3rd, 1945. Now, all the men involved in this suit that worked during that particular week of days, were Magnus and Vaughn, who worked as, you might say, a team, and Key and White, who worked as a team, and Ira Holder, who worked as a helper. His driver was not one named in the suit.

Garcia was the driver. He is involved in the suit [395] but his helper was not so his name was left off. Therefore, we have for this particular study six of the men involved in the suit.

Now then, for the Monday, July 2nd, 1945, and this is a sheet from our cartage book and—

The Court: Mark it for identification so we will know what exhibit we are referring to.

The Clerk: Defendant's Exhibit O, for identification.

(The document referred to was marked as Defendant's Exhibit O, for identification.)

Mr. Moore: Indicating just the one side, showing Monday, July 2nd.

The Court: There is no objection, Mr. Beardsley, if you want to stand up with Mr. Moore and examine the exhibit as it is testified to.

(Testimony of Maynard Diegel)

Mr. Beardsley: Thank you, your Honor.

The Court: It will shorten the examination.

Q. By Mr. Moore: Go ahead, Mr. Diegel.

A. Now, as I explained in the preliminary remarks, we determined from our records, either from the truck numbers or from other identification on the way bills who did each job and eliminated everyone that did not pertain to the case and taken the ones that did. We start out here with Lou and Chappie, which refers to Louie Vaughn and Magnus. They had several jobs on that day which are summarized here on [396] this recap. They did four jobs out of this day's work July 2nd, 1945, on way bills No. 4309, 4308, 5008 and 4906.

Now, of those jobs I have each individual one here and I will go over a few of them and offer the rest of them as evidence. The first one is 4309. It is for a man named Tarwater and Magnus and Vaughn went to this house on Beverly Glen Boulevard to pick up goods to be hauled to San Francisco. This was on a Navy order and the goods had to come in to the warehouse and then loaded on the long distance van and taken to San Francisco, but brought into the warehouse by Vaughn and Magnus.

The evidence of that is an inventory of household effects received, signed by Lou and Chappie, and also signed by Tarwater. It shows Lieutenant Tarwater having given the goods to the men and the men gave a copy of this for a receipt.

Q. What is that called?

A. Inventory of household effects received.

(Testimony of Maynard Diegel)

Q. What does this indicate, the signatures of these men and Tarwater?

A. They say here they have received the above items in the condition as above noted and the owner or agent of the owner signs as having—

Mr. Beardsley: Do you know the signature of Tarwater and of these two men? [397]

The Witness: No, but it is either Tarwater himself or his agent. It is J. W. Tarwater, Lieutenant, U. S. N. R., and these two men. I know that this is Chappie who wrote it for both Louie Vaughn and himself. Chappie is Magnus.

Mr. Beardsley: I will object on the ground no proper foundation laid. These men have been in court and could have identified their signatures if the matter is important.

The Court: It goes to the weight of the testimony more than to its admissibility.

Q. By Mr. Moore: Now, will you go ahead with a description of what this way bill and the supporting documents attached to it indicate?

A. All right. This supporting document is a copy of the invoice made to the Navy and this is the inventory of household effects received and on this there was no packing done because it is marked "Van haul only," so we merely—this study has been brought out merely to show the number of packing hours. We disregarded everything else but packing time, and just merely put a check mark on that. However, Magnus and Vaughn did pack that job on another order. Here is the order—Van pack only for Tarwater. When they packed that they packed this list, which is their—they have to list it and weigh each individual item because we have to bill the Navy for the

(Testimony of Maynard Diegel)

packing at so much per hundred pounds. We have to know how much they packed and here is what they [398] packed on it which consists of four barrels, one large box, three small boxes, and that is all.

Now, we have used a formula which is based on the findings that our company made a year or so ago in making a cost study. Also we have checked this with other cost studies made by other companies in the industry and from our own experience in the business we know that on the average that it takes about three-quarters of an hour to pack a barrel, three-quarters of an hour to pack a large box, a half hour to pack a medium size box, and a quarter of an hour to pack a small box. We have used that as a formula in establishing the amount of time consumed in actual packing on these jobs made in this study. Therefore, on this particular one of Tarwater's, on Way Bill 4308, with packing as I have already mentioned coming to two hours and a quarter time—

Mr. Beardsley: May it please the court, if this line of testimony is offered as counsel indicated a while ago, to impeach the witness' testimony, I believe it is inadmissible. I do not believe the testimony is impeachable by matters based upon averages worked out on a study of the business of the company. I object to it on that ground.

The Court: It isn't so much impeachment, in my opinion, because you cannot impeach a guess. There is no way in law to impeach a guess or estimates. It is part of [399] the defendant's case to show, for instance, they didn't work at all, or something of that kind, to meet the issues. I do not believe it is on the theory of impeachment, is it, Mr. Moore?

(Testimony of Maynard Diegel)

Mr. Moore: This is the defendant's case in chief to show what the records show these men have done.

The Court: All right, proceed.

The Witness: The next case, on Way Bill No. 5008, for Goldwyn. There is evidence in the supporting papers that Magnus and Vaughn picked up one box. It was a medium box and we gave them in the study a quarter of an hour each for packing the medium box, so for that day that was all the packing they did. However, they did one more hauling job for a party by the name of Wynant, from Glendale into the warehouse. It was a small Navy job and on it there was no charge made for packing and there was nothing to be packed, although it was marked "Contract packed" or "Packed by owner." All the items, four boxes, were marked B.P.O., which means Packed by owner, and they were brought in in the same condition that they were found at the house. Consequently, there was no packing time accounted for, computed in that, and we just merely checked it as a hauling job. It is shown on here.

Q. By Mr. Moore: The last reference you made to a document, which shows that they were owner-packed, is on the sheet which bears the signature of Lou and Chappie, and which [400] is the household goods inventory which is prepared by the driver who goes out on the job?

A. Yes.

Mr. Beardsley: Leading and suggestive, if the court please.

The Court: Yes, try to avoid leading questions.

(Testimony of Maynard Diegel)

Q. By Mr. Moore: When a driver leaves the place of business does he take with him any particular documents?

A. He has as part of his equipment orders on which to perform the jobs and also inventories and household effects received, so he can give the customer a copy of anything he might take from their house.

Q. Can you state whether or not the inventory of household effects is on the stationery of the Coast Van Lines or is not a part of the equipment carried by drivers or helpers?

A. Yes; that is our stationery, and it is carried by the drivers of the vans. So, for Monday of this day, Magnus and Vaughn—we have two men who worked all day and maybe some overtime which I haven't taken into consideration. I have just merely shown the amount of time that they consumed in packing, which amounts to two and one-half hours for each man out of their eight hours work or more.

The next is for Key and White on this particular test. Monday they worked on job way bill 4971, for Holmes [401] and Narver. They hauled goods from our warehouse on Margo Street to Holmes and Narver's address on Spring Street. They, according to their time filed in here, worked all day on the job. There was no packing or unpacking charged and there was none done on this job. So I just merely checked that as a hauling job. Didn't show any packing time.

On Holder we have four jobs to enter for this Monday, July 2nd. One is 4967 and it is for going to Beverly Hills and packing one barrel and one box as indicated here. The C. P. is an abbreviation down below which means

(Testimony of Maynard Diegel)

Contract Packed, and that box and that barrel were packed by them and using the same formula as mentioned before we gave each man on the job three-quarters of an hour for packing those two items and Holder would get his three-quarters of an hour for packing time.

The next one is 4976. On this he picked up three cartons—a sea bag and trunk and all the cartons were owner-packed. There was no packing, so we merely noted that as a hauling job.

The next is way bill 55005 for Tompkins at 3855 Roxton Avenue. It was a packed and crated job that Mr. Holder went on and there were nine items in this particular shipment and the first two miscellaneous boxes were the only two contract-packed, packed by us. So, they gave them credit then for packing two medium boxes and we gave a half [402] hour to each man or an hour for packing the two medium boxes, and gave Holder credit for a half hour packing time.

The next job was—

Q. Now, were there other things that were brought in or carried in that same load after the packing had been completed?

A. Yes. All of these other items were loaded into the van and they were hauled back into the warehouse and unloaded by these men.

Q. That appears on the inventory of household effects and the balance of the items, three through ten, book shelves, small chest of drawers, chair, desk, corner shelf, wall mat, sweeper?

A. No packing on this. Just merely loaded into the van and brought into the warehouse.

(Testimony of Maynard Diegel)

Q. All right, what is the next one?

A. The next one is 5006. They proceeded to 2179 West 21st Street, Bailey's house, and they picked up these items which were as evidenced—trunk locker and sea bag, four sea bags; carton owner-packed. Another carton owner-packed, and three handbags—four handbags, another trunk, and a crib; mattress and coffee table and glass. None of that to be packed, so we merely checked it as—I gave them a quarter-hour packing time. It was owner-packed. I shouldn't have given any packing time. [403]

Q. What is the interpretation of the symbols O.P. as far as the office is concerned? A. Owner-packed.

Q. Can you tell us what that means?

A. Well, when the owner packed, why, the boxes already are packed and we pick it up and consequently there is no packing for us to do and we cannot bill the Navy for it nor give any credit to anybody for it.

Q. Well, is there any other service rendered besides the loading and delivering on it by your company?

A. Yes. Our operation which is often referred to as a pack and crate operation involves picking it up at the house—picking these goods up at the house and bringing them in, packing whatever is necessary at the house and bringing them in to the warehouse and crating them for shipment.

Q. All right. What is the next one you have?

A. That was all for Holder for that particular day and he has an hour and a half packing time out of his eight hours work.

(Testimony of Maynard Diegel)

Garcia is the next one with way bill No. 4119 for a man named Lux. We went to his residence at 1440 North Gardner and we picked up three boxes, a small trunk, and a suitcase, and on that we find that those three boxes were packed by our men and the weight of the three boxes— [404]

The Court: Some of the plaintiffs in this case?

The Witness: Yes, this is Garcia, Dave Garcia.

Q. By Mr. Moore: Did he do the packing?

A. Yes, he did his part of the packing. There was a helper with him and they both do packing when they come to the house. The three boxes they packed were two small boxes and one medium box and figuring on the formula we already stipulated—

Mr. Beardsley: There is no stipulation, if the court please.

The Witness: Pardon me—pardon the term, Mr. Beardsley. Three-quarters of an hour for each—three-quarters of an hour for each man.

The next job was on way bill 4120 for a fellow named Clearwater. Garcia driving the truck went to 1131 South Bronson Street on what they call a pack and crate job, and picked up one box and on the instructions the dispatcher has written, "No packing." There was no packing charge and he merely picked up the box and brought it in, so we just checked that as the hauling job. That is 4120.

The next is way bill 4003. This is for another job for this Mr. Lux. One was going to one city and this one is going to another. Two different destinations. This box, No. 1 box, weighed 174 pounds, enough to give it a large classification, and we gave each man a half hour

(Testimony of Maynard Diegel)

credit for [405] packing on that box. That is an hour to pack that box. Half hour for Garcia.

The next is 5004. They went to Hollywood. Garcia drove with instructions from the dispatcher. There was no packing. They picked up this box, owner-packed, a small trunk, owner-packed, a carton that was in bad order and ironing board that had mars and scars on it and they loaded it onto the truck and brought it in and we just checked it as a hauling job.

Q. Those symbols you refer to are the items appearing under heading "Condition"? A. That is right.

Q. O.P. or B.O. or M.S.

The Court: Doesn't this instrument speak for itself? It seems to be in great detail, Mr. Moore.

Mr. Moore: There is an explanation of the symbols to be made.

The Witness: The next is 4974.

The Court: Is it necessary to read this into the record?

The Witness: I can summarize it.

The Court: It does not even need to be summarized. The instrument speaks for itself. That is my point. Offer it in evidence.

The Witness: 4974— [406]

Q. By Mr. Moore: Just a moment, Mr. Diegel. These records that you have examined and those from which you have testified have given you certain facts and figures and can you give a resume of what they show from the same results—I mean, from the same type of breakdown which you have given for these sample cases?

A. Yes. For this week of days the sum total of it is—

(Testimony of Maynard Diegel)

Mr. Beardsley: I object again. There is no proper foundation laid and it does not tend to establish any issue in the case, if the court please.

The Court: Well, I will let the summary in. Where there are voluminous records the rule of evidence is that a summary made by one who is familiar with the records and an expert, can be introduced in evidence, but opposing counsel must have made available to him all the records upon which the summary is based for the purpose of cross examination. That is the rule of evidence. I will permit this to go in but I do not believe it is necessary to read every item that appears on the face of the exhibit. Go ahead.

The Witness: The total packing time per week per man in hours—Magnus had nine and a quarter hours, Vaughn nine and a quarter hours, White three hours, Key three hours, Holder ten and a quarter hours; Garcia nine and a half hours. That is for a week of five days, 40 hours, and this is all [407] the supporting data.

Q. By Mr. Moore: And these are the supporting documents which appear in summarized form in this document? A. Yes.

Mr. Moore: I ask these be marked for identification.

The Court: Yes.

The Clerk: As one exhibit?

The Court: Yes.

The Clerk: That will be Defendant's Exhibit P for identification.

(The documents referred to were marked Defendant's Exhibit P. for identification.)

(Testimony of Maynard Diegel)

The Court: We will take our afternoon recess at this time, for ten minutes.

(Short recess.)

The Court: You may proceed.

Q. By Mr. Moore: Mr. Diegel, have you made any similar examinations for other persons covering other employees who were not on the payroll in July of 1945?

A. Yes, we have.

Q. Have you that with you?

A. Yes, sir. This is a similar report and it shows—

Q. Does it have the supporting documents with it in the same fashion as you described the first one? [408]

A. It has with the exception of the cartage ticket sheets which we were unable to produce.

Q. By that you mean the large white sheets?

A. Yes, but we have taken all of it. In those days they filed the way bills for each particular month like, for instance, the month of March in 1944. All of March way bills were filed together. We have pulled all of the March way bills and segregated them as to the drivers and helpers who are in this suit and happen to be Fisher and Peterson and Smith. On those three we have made the same sort of study as we made in the previous report.

The summary of the three is that we used the work week, starting Monday, March 6th, 1944, and running through Tuesday, March 14th, 1944, Wednesday, March 22nd, 1944, Thursday, March 30th, 1944, and Friday, April 7th, 1944.

Q. What was the finding that you made on the men on this sheet.

(Testimony of Maynard Diegel)

Mr. Beardsley: May it be stipulated the same objection is interposed as to the other?

The Court: So understood.

Q. By Mr. Moore: What are your findings in connection with the party in this suit for this period?

A. Well, of the work week of five days, 40 hours, we find that the packing time for Fisher was 12 hours—actual time used in packing. For Peterson it was 12 hours and for [409] White was two hours and a half. I would like to say that these are no unusual weeks. They are average weeks.

Mr. Beardsley: That is objected to and no proper foundation laid, and ask it be stricken. There is no evidence of a similar study being made for any other period.

The Court: Sustained. It was a voluntary statement and it may go out.

Mr. Moore: I offer this as defendant's next numbered for identification.

The Clerk: Defendant's Exhibit Q for identification.

(The document referred to was marked as Defendant's Exhibit Q, for identification.)

Q. By Mr. Moore: Mr. Diegel, going back to the period in July 1945, can you tell us whether or not there has been a study made of the records of the corporation to determine for the work done by the various members of the—for the various plaintiffs, a determination of the amount of business they did or hauled or handled in intra- or interstate commerce?

A. Yes. At the same time we were preparing the other records and studies on this July of 1945, we made a list of each one of the drivers and helpers who worked

(Testimony of Maynard Diegel)

for us at that time and we find that in the case of Key—

Mr. Beardsley: Same objection to this line of questioning [410]

The Court: It may be so understood. Same ruling.

Q. By Mr. Moore: Go ahead.

The Witness: That he performed 32 jobs in that month as per this list. 22 of them were intra-state movements and ten of them were interstate movements.

In the case of Noble White, who was Key's partner, it is the same: 22 intra-state and 10 interstate.

In the case of Magnus there were 49 way bills in the study. 25 of them were intra-state jobs and 24 were interstate jobs.

In the case of Vaughn there were 45 in the study. 23 were intra-state and 22 were interstate.

In the case of Holder there were 52 jobs. 28 were intra-state and 24 interstate.

In the case of Garcia there were 55 intra-state and eight interstate.

Q. That is all of the men in the suit?

A. No. That is all that drove and helped on the vans in this particular month.

The Court: July?

The Witness: July of '45.

Mr. Moore: I offer the work sheets to which the witness testified as defendant's next in evidence.

The Court: It will be received subject to plaintiffs' objection. [411]

The Clerk: Defendant's Exhibit R in evidence.

(The documents referred to were marked Defendant's Exhibit R, and were received in evidence.)

(Testimony of Maynard Diegel)

Mr. Moore: You may cross examine.

Mr. Beardsley: No questions.

Mr. Moore: The defendant rests.

The Court: Any rebuttal?

Mr. Beardsley: I only anticipated putting on Mr. Key but he is not here and I did not know when counsel was to finish. Do you want his testimony?

Mr. Moore: No.

Mr. Beardsley: That is all. We rest.

Regarding this Defendant's Exhibit K, the summary of the hours, weeks, rates of pay and so on, which was to cover our stipulation, I have not had an opportunity to check it. It has just been handed to us this afternoon. In looking at the first two or three employees I notice there are some periods shown by the summary where they are not—it appears they were not employed. For example, in Mr. Armstrong's case he was not employed for a period of four months or three months in the early part of 1943, and two months in the early part of 1946. His testimony, I believe, was that he was employed straight through. Of course, we are not willing to stipulate unless there is some showing that he was not employed during those times. [412]

In the case of Mr. Fisher he testified he worked a year in '42 and '43 which is not shown at all.

If that is a result of your records being burned by the fire I think that counsel and I can probably confer and arrive at an average for the periods which are not shown.

I am not ready to stipulate this is accurate as to those periods which are omitted about which the men testified they were actually employed.

There may be some explanation Mr. Diegel can give as to the intervals that do not show employment.

Mr. Moore: Your Honor, we have taken every available source, including Social Security records, the personnel records which were burned, and I think a sample of them were shown to the court at the outset of the proceedings and every available record in the custody of the defendants has been used in trying to gather all of the detail that has gone into that exhibit.

Mr. Beardsley: Then I will say that I think, having produced testimony that the employees were employed straight through, and if there is no record which contradicts that, the computation should include pay at the same rate which appears before and after the time when you do not show the man was employed through that time. The loss of their records should not result in a loss to the men. Our [413] stipulation was that the company make the computation and we would take a flat five and a half hours a week right straight through from the first to the last date of employment instead of trying to prove week by week which Saturdays were worked and which Saturdays constituted work over 40 hours per week, and that is the method on which this computation has been made, excepting it eliminates or omits certain periods on the employees I have checked thus far.

Now, I would like to do that by conference with counsel. I think this is a framework on which we can make the stipulation and finally I think that the court make a determination and of the principal issues of the case, and let that computation be completed for the purpose of making the findings.

The Court: Gentlemen, I will ask you to prepare for me just a three or four-page summary of what your con-

tentions are. I have voluminous notes here but I want to be sure I am not overlooking anything. I have 16 pages of notes. I have kept pretty well upon the progress of the trial. It is unfortunate that many of the records have been destroyed which has required an unusual length of time to try the case.

You will return at 9:30 on Monday morning and I will give each side 15 minutes to point out to the court what they believe are the two or three main issues in the case just to be sure I shall not overlook anything. [414]

Gentlemen, the court will recess.

(Whereupon, at 4:00 o'clock p. m., a recess was had in the above entitled matter until 9:30 o'clock a. m., Monday, November 4, 1946, for argument and further proceedings.)

[Endorsed]: Filed Apr. 28, 1947. [415]

[Endorsed]: No. 11635. United States Circuit Court of Appeals for the Ninth Circuit. *Coast Van Lines, Inc.*, Appellant, vs. Bert Armstrong, L. A. Charette, King Fisher, Dave Garcia, Earl Graham, Ira C. Holer, Louis Kanier, Emry Key, Richard Magnus, Leon T. McGrossen, George W. Peterson, Thomas P. Remus, Joe P. Sevedra, Sidney H. Smith, Louie Vaughn, Noble F. White, Harold N. Wheeler and Morris Wolf, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 22, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11635

COAST VAN LINES, INCORPORATED, a California
corporation,

Appellant,

vs.

BERT ARMSTRONG, et al.,

Appellees.

NOTICE RE POINTS ON APPEAL

To Appellees Above Named and to Herbert V. Walker
and Charles Beardsley, Their Attorneys:

Please Take Notice that appellant in the above entitled cause hereby elects to adopt and stand upon the statement of points on appeal already appearing as a part of the transcript herein, this to satisfy the requirements of subdivision 6 of Rule 19, Rules of Practice of United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 29th day of May, 1947.

JOHN W. PRESTON and
PRENTISS MOORE

By John W. Preston

Attorneys for Appellant

Receipt of above Notice is hereby acknowledged.
5/29/47. Herbert V. Walker and Charles Beardsley, by
Charles E. Beardsley, Attorneys for Appellees.

[Endorsed]: Filed Jun. 2, 1947. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause]

STIPULATION CONCERNING EXHIBIT "K"

It Is Hereby Stipulated by and between the appellant and appellees herein, acting through their respective counsel, that appellant makes no exception or objection to Defendant's Exhibit "K", and that all parties agree that all items shown by Exhibit "K" are true and correct and admitted in evidence for all purposes without reservation.

Dated this 18th day of July, 1947.

JOHN W. PRESTON and
PRENTISS MOORE

By John W. Preston

Attorneys for Appellant

HERBERT V. WALKER and
CHARLES BEARDSLEY

By Charles E. Beardsley

Attorneys for Appellees

[Endorsed]: Filed Jul. 21, 1947. Paul P. O'Brien,
Clerk.

No. 11635.

IN THE

United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE
GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIER,
EMORY KEY, RICHARD MAGNUS, LEON T. MCGROSSEN,
GEORGE W. PETERSON, THOMAS P. REMUS, JOE P.
SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE
F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S OPENING BRIEF.

JOHN W. PRESTON, and

PRENTISS MOORE,

458 South Spring Street, Los Angeles 13,

Attorneys for Appellant.

NOV 5 1947

PAUL P. GERRIN

TOPICAL INDEX

	PAGE
Statement re jurisdiction.....	1
Statutes involved	2
Statement of the case.....	2
The pleadings	3
Findings	4
Questions involved	7
Specification of errors.....	7
Summary of argument.....	9
Argument	10

I.

Appellant was a retail or service establishment the greater part of whose selling or servicing was in intrastate commerce, and therefore both appellant and appellees were exempt from the application of the provisions of the Fair Labor Standards Act of 1938.....	10
---	----

II.

Appellees engaged in work and actives for appellant, a substantial portion of their time, involving safety of operations in interstate commerce, hence the overtime provisions of the Fair Labor Standards Act of 1938 were not applicable to appellees, or to appellant.....	18
Detailed activities of appellees.....	24

III.

Where a shipper intends that his goods shall move across a state line, the hauling of such goods by motor truck to common carrier terminals pursuant to such intention constitutes a movement in interstate commerce.....	29
Conclusion	31
Appendix A. Applicable provision of Fair Labor Standards Act of 1938.....App. p.	1
Applicable provisions of Motor Carriers Act.....App. p.	3

TABLE OF AUTHORITIES CITED

CASES	PAGE
Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 146	30
Dallum v. Farmers' Co-Operative Trucking Ass'n., 46 Fed. Supp. 785	29
Fleming v. Kirschbaum Co., 124 F. (2d) 567; aff'd 316 U. S. 517	10, 11
Guess v. Montague, 51 Fed. Supp. 61.....	12
Hughes Bros. Co. v. Minnesota, 272 U. S. 469, 47 S. Ct. 170....	30
Hunt v. National Linen Service Corp., 178 Tenn. 262, 157 S. W. (2d) 608	11
Levinson v. Spector Motor Service, 67 S. Ct. 931.....	20, 21
Lonas v. National Linen Service Corp., 136 F. (2d) 433; cert. den. 320 U. S. 785.....	11
Martino v. Michigan Window Cleaning Co., 145 F. (2d) 163.....	11
Murphy v. Georgia-Areo Tech., 49 Fed. Supp. 982.....	13
New Mexico Public Service Co. v. Engel, 145 F. (2d) 636....	10, 11
Pennsylvania R. R. Co. v. Public Utilities Commission, 298 U. S. 155, 56 S. Ct. 685.....	30
Ripscomb v. Socony-Vacuum Corp., 87 F. (2d) 26.....	30
Schmidt v. People's Tel. Union, 138 F. (2d) 13.....	10, 11
Snively v. Shugart, 45 Fed. Supp. 722.....	11
Strand v. Garden Valley Tel. Co., 51 Fed. Supp. 898.....	10, 11
Stucker v. Roselle, 37 Fed. Supp. 864.....	10, 11
United States v. American Trucking Associations, Inc., 310 U. S. 534.....	19
Walling v. Kerr, 47 Fed. Supp. 852.....	10, 11
Walling v. Silver Bros. Co., 136 F. (2d) 168.....	20
Walling v. Silver Fleet Motor Express, 67 Fed. Supp. 846.....	21
Wood v. Central Sand & Gravel Co., 33 Fed. Supp. 40.....	17

STATUTES

PAGE

Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 216)....	2
Fair Labor Standards Act of 1938, Secs. 6, 7, 13, 16 (29 U. S. C. A., Secs. 206, 207, 213, 216).....	2
Fair Labor Standards Act, Sec. 13(1).....	23, 28
Fair Labor Standards Act, Sec. 13(a)(2) (29 U. S. C. A., Sec. 213(a)(2))	16, 17
Fair Labor Standards Act, Sec. 13(b) (29 U. S. C. A., Sec. 213(b))	18, 22, 23, 28
Interstate Commerce Act (49 U. S. C. A., Supp., Sec. 304)....	
.....	2, 18, 21
Interstate Commerce Act (49 U. S. C. A., Supp., Sec. 304 (a)(1))	7, 19
Interstate Commerce Act (49 U. S. C. A., Supp., Sec. 304 (a)(3))	7
Judicial Code, Sec. 24 (28 U. S. C. A., Sec. 41).....	1
Judicial Code, Sec. 128 (28 U. S. C. A., Sec. 225).....	2

No. 11635.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE
GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIER,
EMORY KEY, RICHARD MAGNUS, LEON T. MCGROSSEN,
GEORGE W. PETERSON, THOMAS P. REMUS, JOE P.
SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE
F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S OPENING BRIEF.

Statement Re Jurisdiction.

This is an appeal from the final judgment of the District Court of the United States for the Southern District of California, Central Division, entered December 3, 1946 [R. 28] for overtime compensation to appellees, liquidated damages, and attorneys' fees. [R. 2-6, 27-28.] Notice of appeal was filed March 12, 1947. [R. 32.] The jurisdiction of the District Court was invoked under Section 24 of the Judicial Code, as amended (28 U. S. C. A., Section 41) and under the Fair Labor Standards

Act of 1938. (29 U. S. C. A., Section 216.) [Complaint, Par. III; R. 3-4.] The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended. (28 U. S. C. A., Section 225.)

Statutes Involved.

The Statutes involved are the Fair Labor Standards Act of 1938, and more particularly Sections 6, 7, 13 and 16 of said Act (29 U. S. C. A., Sections 206, 207, 213 and 216) and the Interstate Commerce Act, as amended. (49 U. S. C. A. Supp., Section 304.) The pertinent provisions of said Acts are set out in Appendix A, annexed hereto.

Statement of the Case.

This appeal is from a judgment of the District Court adjudging that appellees are entitled to recover from appellant the aggregate amount of ten thousand seven hundred forty and 48/100 Dollars (\$10,740.48) for overtime compensation and liquidated damages held to be due them under the Fair Labor Standards Act of 1938, and the additional sum of one thousand dollars (\$1,000.00) as attorneys' fees for appellees' attorneys of record. [R. 27-28.] The amount of actual overtime and liquidated damages adjudged to be due each of the appellees is set forth in the conclusions of law [R. 21-22] and in Schedule "A" annexed to the findings of fact [R. 25-26], and these several amounts are also stated in the judgment. [R. 27-28.]

The Pleadings.

It is alleged in the amended complaint that each of the appellees was employed by appellant, since August 15, 1942, for various periods of time and at various wage rates [R. 3], and that since said date and on frequent occasions each of the appellees performed services for appellant in excess of forty (40) hours per week, for which appellant failed to pay the compensation provided by the Fair Labor Standards Act [R. 4-5], the amounts being unknown to appellees. [R. 5.]

It is also alleged in the complaint that appellant is a California corporation and that at all times mentioned therein was engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, products, commodities and merchandise, the greater part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof. [R. 4.]

In its answer to the amended complaint appellant admitted that it was and is engaged in the business of packing, crating, storing, shipping, handling, and working on goods, wares, products, commodities and merchandise at the times mentioned in the amended complaint. [R. 7.] By way of special defense, appellant alleged in its amended answer that both appellees and appellant are exempt from the application of the provisions of the Fair Labor Standards Act for the following reasons, to-wit: (1) that, at all times mentioned in said complaint, appellant was a service establishment, the greater part of whose servicing was and is in intrastate commerce, and that appellees and each of them were employed by appellant to perform, and performed, work and services in such

service establishment [R. 8-9]; (2) that, at all such times, appellant was a retail establishment, the greater part of whose selling was and is in intrastate commerce, and that appellees and each of them were employed by appellant to perform, and performed, work and services in such retail establishment [R. 9-10]; and (3) that appellees and each of them were employed by appellant to perform, and performed work, and services, a substantial portion of their time, in a business and at occupations necessary to the transportation of goods in interstate commerce, and that appellees and each of them devoted a substantial portion of their time and activity to work necessary to the safety of operations and equipment in interstate commerce. [R. 10-11.]

Findings.

The District Court made elaborate findings of fact [R. 13-26] but only those findings deemed pertinent are summarized herein, as follows:

(1) "That appellant, at all times since August 15, 1942, was and is a California corporation duly authorized to do business in the State." [Finding II; R. 13.]

(2) "That * * * since August 15, 1942, defendant (appellant) has been engaged in the business of packing, crating, storing, handling and working on goods, wares, commodities and merchandise, a considerable part of which was transported or otherwise disposed of among the several States and from the State of California to places outside thereof * * * and for the purpose of the Findings the Court adopts the figures arrived at on an average taken from an analysis of the defendant's records presented in defendant's testimony, which showed

55⅓ per cent intrastate and 44⅔ per cent interstate business.” [Finding IV; R. 14-15.]

(3) “That * * * each of them (appellees) has been in the employ of the defendant, each has been engaged and employed in handling and otherwise working on goods, and in a business and at an occupation necessary to the transportation of goods in interstate commerce * * * during a substantial portion of the time in each work week.” [Finding V; R. 15.]

The Court made the following negative findings:

(4) “That it is not true * * * that defendant was or is a service establishment, or that the greater part of defendant’s servicing was or is in intrastate commerce, or that plaintiffs * * * were employed as employees of a service establishment, or that they engaged in a service establishment * * * the greater part of whose servicing was or is in intrastate commerce.” [Finding X; R. 17.]

(5) “That it is not true * * * that defendant was * * * or is a retail establishment, or that said plaintiffs * * * were, or that any of them was, employed as employees in a retail establishment, the greater part of whose selling was and is in intrastate commerce, but on the contrary, the Court finds that the substantial portion of each of said plaintiff’s work and activities * * * was devoted to interstate shipments and activities.” [Finding XII; R. 18.]

But in the same Finding (No. XII) the Court also found

“that it is true * * * that * * * the intrastate shipments of defendant corporation averaged a larger portion of its business than the interstate shipments.” [R. 18.]

(6) "That it is not true * * * that said plaintiffs, or any of them * * * devoted a substantial portion of his time to the safety of operations and equipment * * * in such manner as to be exempt from the application of the provisions of the Fair Labor Standards Act of 1938, or to come within the provisions of Section 13(b) of the Act, or to come within that class of employees as to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act." [Finding XIII; R. 19.]

These positive and negative findings are in obvious conflict as to the vital issues of this case, as will fully appear later herein. It is sufficient at this time to merely note the conflict. Moreover, the negative findings are not supported by, but are contrary to, the evidence.

Concisely stated, appellant's business consisted, mainly, in the transportation and storage of goods, mainly household goods, wares and merchandise both intrastate and interstate. In connection with, incidental to and as a part of its main business it rendered services to its customers consisting of the packing, crating, hauling and delivering of such goods, household goods, wares and merchandise to and from common carriers and to and from its warehouses to, or for, its customers. The principal part of its business, that is, $55\frac{1}{3}$ per cent thereof, was intrastate. [Finding IV; R. 14-15.]

Questions Involved.

The principal questions involved in this appeal are briefly stated as follows:

1. Was appellant a service establishment the greater part of whose servicing was in intrastate commerce, and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

2. Was appellant a retail establishment the greater part of whose selling was in intrastate commerce, and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

3. Were the appellees engaged, a substantial portion of their work time, in work for appellant involving safety of operations and equipment in interstate commerce and were they subject to the provisions of the Interstate Commerce Act (49 U. S. C. A. Supp., Section 304(a)(3)) and, by reason thereof, were appellant and appellees exempt from the application of the provisions of the Fair Labor Standards Act?

As already noted, the questions involved in this appeal were raised by the special defenses set up in the answer of appellant to the amended complaint. [R. 8-11.]

Specification of Errors.

Appellant relies upon each and all of the errors specified in its "Statement of Points Upon Which Appellant Intends to Rely" [R. 33-36], but more especially upon the following, to-wit:

1. The District Court erred in holding that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce.

2. The District Court erred in holding that appellees were not employed to perform and did not perform, a substantial portion of their time, work and services in a service establishment.

3. The District Court erred in holding that appellant was not a retail establishment the greater part of whose selling was in intrastate commerce.

4. The District Court erred in holding that appellees were not employed to perform and did not perform, a substantial portion of their time, work and services in a retail establishment.

5. The District Court erred in holding that appellees were not engaged, a substantial portion of their time, in performing work and services for appellant involving safety of operations and equipment in interstate commerce.

6. The District Court erred in holding that appellant was not exempt from the application of the provisions of the Fair Labor Standards Act of 1938 because of the following facts: (a) it was a service establishment the greater part of whose servicing was in intrastate commerce; (b) it was a retail establishment the greater part of whose selling was in intrastate commerce, and (c) its employees, the appellees, were employed to perform and performed work and services, a substantial portion of their time, involving safety of operations and equipment in interstate commerce.

7. The District Court erred in holding that appellees were not exempt from the application of the provisions of

the Fair Labor Standards Act of 1938 because, as the Court erroneously found: (a) they were not employed to perform and did not perform, a substantial portion of their time, work and services in a service establishment the greater part of whose servicing was in intrastate commerce; (b) they were not employed to perform and did not perform, a substantial portion of their time, work and services in a retail establishment the greater part of whose selling was in intrastate commerce; and (c) they were not employed to perform and did not perform, a substantial part of their time, work and services involving safety of operations and equipment in interstate commerce.

Summary of Argument.

Appellant was a service establishment and a retail establishment the greater part of whose servicing and selling was in intrastate commerce within the meaning of the Fair Labor Standards Act of 1938.

Appellees were employed by appellant to perform, and in fact, performed, services, a substantial portion of their time, in a service establishment or a retail establishment, the greater part of whose servicing and selling was in intrastate commerce.

Appellees were employed by appellant to perform and performed work and services, a substantial portion of their time, involving safety of operations and equipment in interstate commerce.

For the foregoing reasons, appellant was exempt from the application of the wage and hour provisions of the Fair Labor Standards Act of 1938, hence the judgment of the District Court is erroneous and should be reversed.

ARGUMENT.

I.

Appellant Was a Retail or Service Establishment the Greater Part of Whose Selling or Servicing Was in Intrastate Commerce, and Therefore Both Appellant and Appellees Were Exempt From the Application of the Provisions of the Fair Labor Standards Act of 1938.

The terms "retail establishment" and "service establishment" are not defined in the Fair Labor Standards Act of 1938, hereinafter referred to as "the Act." Nor have those terms been judicially defined in language broad enough to include all such establishments. The Courts have, as a rule, limited the definitions of those terms to the facts involved in each particular case under consideration.

The term "service establishment" has been construed by the Court to include the following businesses and establishments: *Barber Shops* (*Fleming v. Kirschbaum Co.*, 124 F. (2d) 567, aff. 316 U. S. 517; *Schmidt v. People's Tel. Union*, 138 F. (2d) 13; *Walling v. Kerr*, 47 Fed. Supp. 852; *Strand v. Garden Valley Tel. Co.*, 51 Fed. Supp. 898; *New Mexico Public Service Co. v. Engel*, 145 F. (2d) 636, 641); *Beauty Parlors* (*Fleming v. Kirschbaum*, 124 F. (2d) 567; *Schmidt v. People's Tel. Union*, 138 F. (2d) 13; *N. M. Pub. Ser. Co. v. Engel*, 145 F. (2d) 636, 641); *Shoe Shining Parlors* (*Fleming v. Kirschbaum Co.*, 124 F. (2d) 567; *Schmidt v. People's Tel. Union*, 138 F. (2d) 13; *Stucker v. Roselle*, 37 Fed. Supp. 864; *N. M. Pub. Ser. Co. v. Engel*, *supra*); *Shoe Repairing Shops* (*Walling v. Kerr*, 47 Fed. Supp. 852); *Tailor Shops* (*Walling v. Kerr*, 47 Fed. Supp. 852; *Strand*

v. Garden Valley Tel. Co., 51 Fed. Supp. 898); *Clothes Pressing Clubs* (*Fleming v. Kirschbaum Co.*, *supra*; *Schmidt v. People's Tel. Union*, *supra*; *Stucker v. Roselle*, *supra*); *Laundries* (*Fleming v. Kirschbaum*, *supra*; *Schmidt v. People's Tel. Union*, *supra*; *Strand v. Garden Valley Tel Co.*, *supra*); *Linen Supply Service Establishment* (*Lonas v. National Linen Service Corp.*, 136 F. (2d) 433, cert. denied 320 U. S. 785; *Hunt v. National Linen Service Corp.*, 178 Tenn. 262, 157 S. W. (2d) 608); *Automobile Repair Shops* (*Fleming v. Kirschbaum Co.*, *supra*; *New Mexico Pub. Ser. Co. v. Engel*, *supra*); *Restaurants* (*Schmidt v. People's Tel. Union*, 138 F. (2d) 13); *Hotels* (*Schmidt v. People's Tel. Union*, *supra*; *Strand v. Garden Valley Tel. Co.*, 51 Fed. Supp. 898); *Garages* (*Schmidt v. People's Tel. Union*, 138 F. (2d) 13; *Strand v. Garden Valley Tel. Co.*, 51 Fed. Supp. 898); *Funeral Homes* (*Schmidt v. People's Tel. Union*, 138 F. (2d) 13); *Window Cleaning Establishments* (*Martino v. Michigan Window Cleaning Co.*, 145 F. (2d) 163); and *Optometrists* (*Snaveley v. Shugart*, 45 Fed. Supp. 722). It is thus seen that the term "service establishment" has been judicially construed to include a wide variety of services rendered to persons, and to property.

In the Annotation to *Lonas v. National Linen Service Corporation*, 150 A. L. R. 697 (136 F. (2d) 433), at page 700, the annotator says:

" 'Service establishments' whose employees are excepted from the operation of the act are establishments which, like retail establishments, deal with the general consuming public—as distinguished from some specialized field of business activity—selling, however, services instead of goods. The services rendered must, as a rule, be rendered to the ultimate con-

sumer thereof, and not to one who avails himself thereof as a necessary step or ingredient in the processing or manufacturing of goods for interstate commerce * * * although in some cases rendition of services even to industrial and commercial concerns, as distinguished from private consumers, was held to make the concern a 'service establishment,' particularly where there was no necessary relation between the service rendered and the interstate character of the business of the customer served. See, for example, *Lonas v. National Linn Serv. Corp.* (C. C. A. 6th) (reported herewith) *ante*, 697; *Martino v. Michigan Window Cleaning Co.* (1943; D. C.), 51 F. Supp. 505; *Hunt v. National Linen Serv. Corp.* (1941), 178 Tenn. 262, 157 S. W. (2d) 608."

In *Guess v. Montague*, 51 Fed. Supp. 61, the employer operated a local repair shop and sold machinery and supplies to individual customers, and the employer's out of State business was less than 5% of total sales. The Court held that the employer was exempt because he operated a retail or service establishment the greater part of whose selling or servicing was in intrastate commerce. In respect to the meaning of the term "service establishment" the Court said, at page 65:

"The term 'service establishment', as used in the Act, undoubtedly has reference to a business in which the owner thereof renders some character of service, at an established location, to members of the general public, in consideration of a charge to be made therefor. Establishment is undoubtedly used in the sense of business. However, it is not every business that falls within the exception. To be exempt the business must be one where service is rendered to

others as a general business of the owner thereof and not merely some service which is purely incidental to another character of operation. The word service, like many other English words, has many meanings. In determining the sense in which the word is used resort must be had of necessity to the context. Here there can hardly be any escape from the conclusion that the sense in which the word service was used in the Act is that of supplying labor or skill for the benefit of others as a business, such as was the case in the instant controversy. Since the defendant was operating a service establishment the greater part of whose servicing was in intrastate commerce the Fair Labor Standards Act is not applicable and the plaintiffs' case must fail."

In *Murphy v. Georgia-Aero Tech.*, 49 Fed. Supp. 982, the Court said, in respect to what is a "service establishment" at page 985:

"The service establishment contemplated by the section (Section 13(a) (2) of the Act) is one that, somewhat like a retail store, serves customers indiscriminately as a business and performs work or labor on the person or the property of the customer or serves his physical needs or desires * * *."

In view of the foregoing judicial statements as to what constitutes a service establishment, the following record facts, in addition to those already stated, must be noted.

The appellant was not a mere hauler of dry freight. It was engaged in the business of packing, crating, storing, handling and working on goods limited, almost exclusively, to household goods. (Finding No. IV.) That finding (No. IV) is correct as far as it goes, but to give the finding its full meaning and effect in respect to

the service establishment exemption claimed by the defendant, one must analyze and understand the evidence upon which this finding is predicated.

It might throw further light on the subject to point out that near the close of the period of time covered by appellees' complaint, there was a complete change of ownership and management of the defendant corporation. Consequently, the appellant was at a great disadvantage in producing testimony favorable to itself during the period in question. However, appellees' own witnesses gave testimony favorable to the appellant in this regard.

Thus, Estel C. Jamison, a former vice-president, stockholder and superintendent of appellant [R. 43, lines 12 to 18] testified that appellant handled no freight other than household goods of Navy personnel. [R. 45, lines 18 to 20.] Exhibit "C", which is the most accurate evidence in the record, indicates that over 88½% of appellant's business consisted of handling household effects for private individuals. Harry C. Retzer, a former sales manager of appellant [R. 49, line 30] and former manager of its operations [R. 50, line 14] testified that in addition to the mere physical moving and storing of goods, numerous other services and courtesies were extended to appellant's customers as a regular part of its business. For example, wardrobe service was recommended [R. 70, line 30] as were plumbers [R. 71, lines 1 to 5], insurance coverage and changes [R. 71, line 6 to 13], treatment of rugs [R. 71, lines 26 and 27] and treatment of articles for preservation against moths. [R. 71, lines 28 and 29.]

In these and many other ways appellant rendered service to its customers beyond the mere transportation and stor-

age of inanimate objects. Appellant consulted with customers with regard to their personal belongings, advised selling rather than shipping in some cases, and made appraisals in such instances [R. 116, lines 25 to 30]; advised about utility disconnections [R. 116, lines 30 to 32]; advised about special handling of radios [R. 117, lines 1 to 4]; advised about cleaning, sterilizing and moth proofing of rugs and woolen items [R. 117, lines 6 to 11] and upholstered furniture [R. 117, lines 11 to 15], and arranged with cleaners to have the customer's furniture and belongings cleaned. [R. 119, lines 1 and 2.] If a customer decided to sell goods in storage rather than to ship or reship them, appellant arranged for appraisers or furniture dealers to appraise or bid on the articles. [R. 120, lines 13 to 15.] When furniture was redelivered to a customer, the rugs were wiped off [R. 121, line 24], the upholstery dusted [R. 121, line 25], and the furniture rubbed down. [R. 121, lines 25 and 26.] In fact, the defendant helped hang drapes and pictures [R. 122, lines 5 and 6] and even unpacked and arranged the customer's furniture in its new location. [R. 122, lines 21 to 31.]

It cannot be doubted upon fair consideration of the facts shown by the record in this case, and the law applicable thereto, that appellant was a service establishment, selling services instead of goods; and that it served indiscriminately any member of the public desiring its services by supplying labor and skill to their property and for their benefit for hire. Summarized, briefly, appellant's business consisted principally of the following services: It supplied labor, skill and services to its customers, indiscriminately and for hire, consisting of the packing, crating, handling, working on, hauling, shipping, storing and transporting of their goods (principally house-

hold goods and effects), wares and merchandise from and to their customers' homes, from and to carriers, and from and to its storage warehouses.

The trial court found that

“(appellant) has been engaged in the business of packing, crating, storing, shipping, handling and working on goods, wares, produces, commodities and merchandise” and that the evidence as to appellant’s business “showed $55\frac{1}{3}$ per cent intrastate and $44\frac{2}{3}$ per cent interstate business.” [R. 14-15.]

This finding required the legal conclusion that appellant was a service establishment, and that both appellant and appellees were exempt from the application of the wage and hour provisions of the Act by reason of Section 13(a)(2) thereof (29 U. S. C. A. Section 213(a)(2)) which provides:

“The provisions of Sections 206 and 207 (the wage and hour provisions) of this title shall not apply with respect to * * * (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * *”

In view of the finding of the trial Court, last above quoted, it was error for the Court to hold that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce.

It should be noted in this connection that the phrase “the greater part of whose selling and servicing”, as used

in Section 13(a)(2) of the Act (29 U. S. C. A. Section 213(a)(2)), refers and applies to the employer and not to the employee. This phrase was construed in *Wood v. Central Sand & Gravel Co.*, 33 Fed. Supp. 40, at page 46, as follows:

“Whether Section 13(a)(2) applies must be determined, in each case, upon all the facts shown in the record. Certain common-sense considerations, however, are appropriately applied as criteria in all cases. Among these, it is obvious that the applicability of Section 6, covering minimum wages, and of Section 7, covering maximum hours, depends upon the nature of the *employment of the individual employee*; while the exemption provided in Section 13(a)(2) depends upon the nature of the *business conducted by the employer*. Another obvious distinction, between Section(s) 6 and 7 on the one hand and Section 13(a)(2) on the other, is that, under the former, *some* employees in any given business enterprise may be covered by the Fair Labor Standards Act and others not; while, under the latter, *all* the employees of the industry are exempted, if any are.” (Italics, the Court’s.)

The nature of appellant’s business having been shown by the evidence and findings to constitute appellant a service establishment, and the Court having found that 55 $\frac{1}{3}$ % of its business was intrastate, the Court should have concluded as a matter of law that appellant and appellees were exempt from the application of the wage and hour provisions of the Act, and, therefore, judgment should have been for appellant.

II.

Appellees Engaged in Work and Actives for Appellant, a Substantial Portion of Their Time, Involving Safety of Operations in Interstate Commerce, Hence the Overtime Provisions of the Fair Labor Standards Act of 1938 Were Not Applicable to Appellees, or to Appellant.

Appellees were employed by appellant as drivers of trucks, helpers, packers, loaders, mechanics and checkers and their work and activities, as such, a substantial portion of their time, involved safety of operations in interstate commerce. The overtime provisions of the Fair Labor Standards Act were, therefore, not applicable to appellees, by reason of Section 13(b) of that Act (29 U. S. C. A. Section 213(b)), and the provisions of Section 304 of Title 49 U. S. C. A. giving jurisdiction of such employees to the Interstate Commerce Commission.

Section 13(b) of the Fair Labor Standards Act (29 U. S. C. A. Section 213(b) provides as follows:

“The provisions of Section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49; * * *”

Section 304 of Title 49 U. S. C. A. (Motor Carriers Act) provides:

“(a) It shall be the duty of the (Interstate Commerce) Commission—

“(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable require-

ments with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.”

Appellant comes within the scope of subdivision (1) of Section 304(a) of Title 49 U. S. C. A., *supra*, being a common carrier of property for hire.

The Interstate Commerce Commission, following hearings, has held that the following employees of motor carriers are engaged in activities involving safety of operations in interstate commerce and are within the jurisdiction of the Commission, to wit:

(1) The drivers of motor vehicles engaged in transporting passengers or property in interstate and foreign commerce. (13 M. C. C. 481, 1 Fed. Car. Cases, Par. 7344; *United States v. American Trucking Associations, Inc.*, 310 U. S. 534.)

(2) Helpers, that is, those who ride on such vehicles and who assist in loading and unloading and other activities, but who do not drive. Such helpers include those who dismount on approach to railroad crossings and flag the driver across the tracks; or when the vehicle is being turned around on a busy highway; or when it is entering or emerging from a highway; or in placing flags, etc. when a breakdown occurs; or in changing tires; or, in general, whose duties affect actual safety of operations. (*Ex parte M. C. 2*, March 4, 1941.)

(3) Loaders hired by motor carriers to load, unload, or transfer freight between motor vehicles. (*Id.*)

(4) Mechanics whose primary duties are to keep the motor vehicles so used in good, safeworking condition. (*Id.*)

In respect to these employees, it was said in *Walling v. Silver Bros. Co.*, 136 F. (2d) 168, at page 170:

“Stated differently, the Bayley case (*Southern Gasoline Co. v. Bayley*, 319 U. S. 44, 63 S. Ct. 917) holds that Congress withdrew from the coverage of the (Fair Labor Standards) Act employees of private carriers, that is, drivers, helpers, mechanics and loaders regardless of whether the Interstate Commerce Commission regulates their activities.”

In the late case of *Levinson v. Spector Motor Service*, 67 S. Ct. 931, the Supreme Court held that a “checker” or “terminal foreman”, a substantial part of whose activities consisted of doing, or immediately directing, the work of loading freight for an interstate motor carrier, is excluded from the overtime provisions of the Fair Labor Standards Act; and that such employee is subject to the jurisdiction of the Interstate Commerce Commission.

In the *Spector* case the Supreme Court gave full effect to the findings of the Commission, saying in respect thereto:

“We have set forth the Commission’s record of supervision over this field of safety of operation * * * to demonstrate the high degree of its competence in this specialized field which justifies reliance upon its findings, conclusions and recommendations.” (*Id.* p. 945.)

The Supreme Court also said in the *Spector* case (*Id.* page 945) that to be exempt from the coverage of the Fair Labor Standards Act employees must devote a substantial part of their *activities*, as distinguished from *time*, in safety of operations in interstate commerce. While the Court does not define the word “substantial”, it states in this connection (*Id.* page 944):

“It is the *character* of the activities rather than the proportion of either the employee’s time or of his activities that determines the actual need for the Commission’s power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operations and equipment * * * So here it is enough for the purposes of this case that a substantial part of the petitioner’s activities consisted of the doing or immediate direction of the very kind of activities of a loader that are described by the Commission as directly affecting safety of operation. The petitioner’s activities thus affected safety of operation, *although it does not appear what fraction of his time was spent in activities affecting safety of operation.*” (Italics ours.)

The Court thus emphasizes character of activities, not time, as the controlling factor in determining whether an employee is engaged in safety of operations within the meaning of the Motor Carrier Act. (49 U. S. C. A. Section 304.)

In *Walling v. Silver Fleet Motor Express*, 67 Fed. Supp. 846, tried by Circuit Judge Miller of the Sixth Circuit Court of Appeals, the coverage of the exemption

provided by Section 13(b) of the Fair Labor Standards Act (29 U. S. C. A. Section 213(b)) was held to include, in addition to the employees mentioned, *supra*, yard drivers, city collection and delivery drivers, and trailer and body mechanics who inspect and repair such defects as might normally result in accident on the highway if not discovered and repaired. In this connection the Court said, at page 854 (*id.*):

“I accordingly rule that drivers (including yard drivers and C and D drivers), drivers’ helpers, mechanics, and loaders perform work which directly affects the safety of operation and are exempt from the provisions of the Wage and Hour Law. Loaders include the chief loader, assistant loader and loaders, in that the crew works as a unit and the supervision and overall inspection and approval of the work rest upon the chief loader and assistant loader. * * * I see very little difference between inspection and proper maintenance of the tractor and motor and the inspection and proper maintenance of the trailer where such work remedies defects which have a direct causal connection with the safe operation of the unit as a whole. Accordingly, the work of trailer mechanics and body mechanics in inspecting trailers and repairing such defects thus discovered as might normally result in an accident on the highway if not discovered and repaired, and the proper maintenance of the trailers to prevent such defects from coming into existence, also have a direct causal connection with the safety of operation and are within the exempt provision.”

The Court then said, in respect to the time and activities of an employee necessary to bring such employee within the exemption provided by Section 13(b)(1) of the Fair Labor Standards Act, at page 854:

“Proceeding on the basis of the foregoing rulings, there is still presented the question of whether or not an employee is exempt who spends part of his time each week in exempt activities and part of his time each week in non exempt activities. The Administrator’s contention that such an employee is not exempt unless he spends fifty per cent of his time in the exempt activities is not sustained by the ruling heretofore made by the Circuit Court of Appeals for this Circuit. It was stated in *Walling v. Morris*, 6 Cir., 155 F. 2d 832, following *Fletcher v. Grinnell Bros.*, 6 Cir., 150 F. 2d 337, 340, and *West Kentucky Coal Co. v. Walling*, 6 Cir., 153 F. 2d 582, that such an employee is in the exempt classification if he devotes a substantial part of his time during the work week to work of the exempt classification. In *Richardson v. James Gibbons Co.*, 4 Cir., 132 F. 2d 627 (affirmed at 319 U. S. 44, 63 S. Ct. 917, 87 L. Ed. 1244, without discussion of that issue), the Circuit Court held that an employee who devoted twenty-five per cent of his time during the work week to exempt activities was exempt from the provisions of the Wage and Hour Law. In *Walling v. Comet Carriers*, *supra*, the Circuit Court of Appeals stated without it being necessary to so rule, that one day’s work in any one week could reasonably be considered substantial.”

DETAILED ACTIVITIES OF APPELLEES.

The activities and work of the appellees, as disclosed by their own testimony, shows that they, and each of them, come within the scope of the authorities relating to safety of operations, *supra*.

Bert Armstrong: Furniture crater for entire term of employment; crated goods for shipment. [R. 78.] Loaded only railroad cars, not vans, all in interstate commerce. [R. 79.]

Emory Key: Packer and driver after March 1, 1944. [R. 84.] Drove 2½ to 3 hours per day [R. 86], 20% loading and 10% driving. [R. 91.]

Earl Graham: Loader, packer, unloader, unpacker. [R. 175.] Drove truck 3 days per week for 4 months [R. 176], all interstate.

Louis Kanier: Warehouseman; no loading or driving. Did some unloading. [R. 181.]

Thomas P. Remus: Did weighing and stencilling, and some unloading, 65% interstate. [R. 183.]

Joseph Savedra: Crater for 3½ months [R. 186], and thereafter helper on line van assignment truck for 9 months. [R. 188.]

George W. Peterson: Packer and driver [R. 189], all interstate. [R. 190.]

Louie Vaughn: On cross-country truck 8 weeks. [R. 198.] Thereafter packer 10% to 15% of time driving, and packer remainder. [R. 202.]

Leon T. McRossen: Packer 80% [R. 204], loader 5% to 10% [R. 209], and driver 10% to 15% of time. [R. 209.]

Ira C. Holder: Helper on truck 1943 to 1944 [R. 211-212] to Sept., 1945 [R. 213], then warehouseman [R. 213], 20% in truck [R. 214], 20% loading and unloading [R. 214] and 60% packing. [R. 214.]

Noble F. White: Helper on truck [R. 216], driving part of the time [R. 217], and loading and unloading remainder without giving percentage.

David Garcia: Hauling freight all the time [R. 218]; goods came from out of state. [R. 220].

Morris Wolf: Crater and packer [R. 221], mostly for interstate shipment. [R. 221.]

Harold N. Wheeler: Mechanic's helper March to December, 1944 [R. 223]; thereafter reported mechanical defects, changed flat tires, exchanged and overhauled motors and fixed brakes. [R. 225-226.] Before becoming mechanic's helper gassed and oiled trucks.

Richard Magnus: Packer 75% to 80% of time, loading and unloading 5%, driving truck 15%. [R. 230.]

L. A. Charette: Packer all the time. [R. 236-237.]

King Fisher: Packer, mover, handler of household goods of Navy personnel. [R. 267.]

Sidney H. Smith: Packer and driver [R. 269] for four months [R. 270] then trucking freight to Long Beach. [R. 271.]

In this connection Harry Retzer, appellant's witness and its former manager of operations, testified that packers actually did 90% packing and 10% driving. [R. 58.] Ernest R. Farmer, its former dispatcher and warehouse manager, confirmed Mr. Retzer's testimony. [R. 75.]

Maynard Diegel, appellant's assistant secretary and manager [R. 136], gave testimony concerning the amount of time spent by each of certain appellees in activities intrastate and interstate, respectively [R. 273-287], filing numerous supporting documents. The trial court permitted Mr. Diegel to summarize the contents of these documents and to file the summary as appellant's (defendant's) Exhibit "P". [R. 284.] In respect thereto Mr. Diegel testified as follows:

"The Witness: The total packing time per week per man in hours—Magnus had nine and a quarter hours, Vaughn nine and a quarter hours, White three hours, Key three hours, Holder ten and a quarter hours; Garcia nine and a half hours. That is for a week of five days, 40 hours, and this is all (407) the supporting data.

Q. By Mr. Moore: And these are the supporting documents which appear in summarized form in this document? A. Yes.

Mr. Moore: I ask these be marked for identification.

The Court: Yes.

The Clerk: As one exhibit?

The Court: Yes.

The Clerk: That will be Defendant's Exhibit P for identification." [R. 284.]

* * * * *

"Q. By Mr. Moore: Mr. Diegel, have you made any similar examinations for other persons covering other employees who were not on the payroll in July of 1945? A. Yes, we have.

Q. Have you that with you? A. Yes, sir. This is a similar report and it shows * * *

Q. Does it have the supporting documents with it in the same fashion as you described the first one? (408) A. It has with the exception of the cartage ticket sheets which we were unable to produce.” [R. 285.]

* * * * *

“Q. By Mr. Moore: Mr. Diegel, going back to the period in July, 1945, can you tell us whether or not there has been a study made of the records of the corporation to determine for the work done by the various members of the—for the various plaintiffs, a determination of the amount of business they did or hauled or handled in intra- or interstate commerce? A. Yes. At the same time we were preparing the other records and studies on this July of 1945, we made a list of each one of the drivers and helpers who worked for us at that time and we find that in the case of Key—

Mr. Beardsley: Same objection to this line of questioning (410).

The Court: It may be so understood. Same ruling.

Q. By Mr. Moore: Go ahead.

The Witness: That he performed 32 jobs in that month as per this list. 22 of them were intrastate movements and ten of them were interstate movements.

In the case of Noble White, who was Key's partner, it is the same: 22 intrastate and 10 interstate.

In the case of Magnus there were 49 way bills in the study. 25 of them were intrastate jobs and 24 were interstate jobs.

In the case of Vaughn there were 45 in the study. 23 were intrastate and 22 were interstate.

In the case of Holder there were 52 jobs. 28 were intrastate and 24 interstate.

In the case of Garcia there were 55 intrastate and 8 interstate.

Q. That is all of the men in the suit? A. No. That is all that drove and helped on the vans in this particular month." [R. 286, 287.]

This testimony concerning the activities of the named appellees (plaintiffs) is representative of the activities of all of the appellees and, considered in connection with the testimony of the appellees themselves, shows beyond question that appellees were engaged in work involving safety of operations in interstate commerce a substantial part of their time. Moreover, the Court's finding that $44\frac{2}{3}\%$ of appellant's business was interstate [Finding No. IV, R. 14-15], confirms generally the testimony above quoted.

In view of all the testimony quoted, or adverted to, *supra*, there can be no doubt that appellees were engaged in work and activities involving safety of operations in interstate commerce, hence they were exempt from the overtime provisions of the Fair Labor Standards Act of 1938. (29 U. S. C. A. Section 213(b)(1).)

III.

Where a Shipper Intends That His Goods Shall Move Across a State Line, the Hauling of Such Goods by Motor Truck to Common Carrier Terminals Pursuant to Such Intention Constitutes a Movement in Interstate Commerce.

The record shows that a substantial part of the goods handled by appellant for its customers was intended by them to be shipped to other states or to foreign countries. The intention of the shipper is controlling, and the hauling of his goods to a railroad depot or other carrier terminal is a part of the stream of interstate commerce. This principle of law, with citation of authority, is stated in *Dallum v. Farmers' Co-Operative Trucking Ass'n.*, 46 Fed. Supp. 785, at page 788, as follows:

“The intention of the original shipper to move these goods across state lines to definite interstate destinations is established in the evidence by the shipping directions issued in connection with each shipment. The movements of the goods by the defendant and other carriers was done in the performance of a preconceived intention to transport said goods to interstate destinations. There was a practical continuity in the movements.

“The courts have repeatedly held that such characteristic movements and handling of goods constitute shipments in interstate commerce. *United States et al. v. Erie Railroad Company, et al.*, 280 U. S. 98, 50 S. Ct. 51, 74 L. Ed. 187; *Hughes Brothers Timber Company v. Minnesota*, 272 U. S. 469, 47 S. Ct. 170, 71 L. Ed. 359; *Philadelphia & Reading Railway Company v. Hancock*, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907; *Baltimore & Ohio Southwestern Railroad Company v. Settle et al.*, 260 U. S. 166, 43 S. Ct.

28, 67 L. Ed. 189; *Meyers v. Railroad Commission*, 218 Cal. 316, 23 P. (2d) 26, decided June 1, 1933; *Buckingham Transportation Co. of Colorado, Inc. v. Black Hills Transportation Co., et al.*, 66 S. D. 230, 281 N. W. 94, decided Aug. 13, 1938; *Railroad Commission of Ohio v. Worthington*, 225 U. S. 101, 32 S. Ct. 653, 56 L. Ed. 1004; *Wm. E. Rush Common Carrier Application*, M. C. C., Volume 17, 661, decided August 9, 1939.

“The fact that several carriers participated in the movement, that different modes of transportation were used, and that rebilling from intermediate points was required, does not destroy the continuity of movement, nor does it destroy its interstate character. See *Hughes Brothers Timber Company v. Minnesota, supra.*”

The principle announced, *supra*, has been held to apply when the goods are started on their journey although still in the possession of the consignor. (See, *Pennsylvania R. R. Co. v. Public Utilities Commission*, 298 U. S. 155, 56 S. Ct. 685, 689; *Hughes Bros. Co. v. Minnesota*, 272 U. S. 469, 475, 47 S. Ct. 170; *Champlain Realty Co. v. Brattleboro*, 260 U. S. 366, 43 S. Ct. 146.)

And, interstate commerce continues until such goods come to rest in the state of destination either in the hands of the consignee, or in a warehouse, no further movement in interstate commerce being contemplated. (See, *Ripscomb v. Socony Vacuum Corp.*, 87 F. (2d) 26; and cases cited, at page 267.)

Conclusion.

The trial court committed reversible error in holding: First, that appellant was not a service establishment the greater part of whose servicing was in intrastate commerce and that appellees were not engaged in such an establishment; and Second, that appellees were not engaged in activities, a substantial part of their time, involving safety of operations in interstate commerce. The evidence shows the contrary.

The judgment should be reversed.

Respectfully submitted,

JOHN W. PRESTON, and
PRENTISS MOORE,

By JOHN W. PRESTON,
Attorneys for Appellant.

APPENDIX A.

Applicable Provisions of Fair Labor Standards Act of 1938.

Section 6 of said Act (29 U. S. C. A., Section 213) provides, in part:

“(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

“(1) during the first year from the effective date of this section, not less than 25 cents an hour;

“(2) during the next six years from such date, not less than 30 cents an hour;

“(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, whichever is lower, and

“(4) at any time after the effective date of this section, not less than the rate (not in excess of 40 cents an hour) prescribed in the applicable order of the Administrator issued under section 208 of this title, . . .”

Section 7 of said Act (29 U. S. C. A., Section 207), provides, in part:

“(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

“(1) for a workweek longer than forty-four hours during the first year from the effective date of this section;

“(2) for a workweek longer than forty-two hours during the second year from such date, or

“(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.”

Section 13 of said Act (29 U. S. C. A., Section 213) provides, in part:

“(a) The provisions of sections 206 and 207 of this title shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); *or (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce; * * ** (Italics ours.)

“(b) The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49.”

Section 16 of said Act (29 U. S. C. A., Sec. 216) provides, in part:

“(b) Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional

equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

APPLICABLE PROVISIONS OF MOTOR CARRIER ACT.

The Motor Carrier Act (49 U. S. C. A. Supp., Section 304), provides, in part:

"(a) *Powers and duties generally.* It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, *qualifications and maximum hours of service of employees, and safety of operation and equipment.*" (Italics ours.)

The Act (Section 204 (b) and (c)) contains similar provisions in respect to contract carriers by motor vehicle and private carriers of property by motor vehicle.

No. 11635.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMERY KEY, RICHARD MAGNUS, LEON T. McCROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLEES' REPLY BRIEF.

CHARLES E. BEARDSLEY,
601 Rowan Building, Los Angeles 13,

HERBERT V. WALKER,
PERRY BERTRAM,

744 Chamber of Commerce Building, Los Angeles 15,
Attorneys for Appellees.

FILED

FEB 5 - 1948

TOPICAL INDEX

	PAGE
Statement re jurisdiction and re the pleadings.....	1
Statement of the case.....	1
Summary of the argument.....	4
Argument	5

I.

Appellant was not a retail establishment because it made no retail sales	5
--	---

II.

Appellant was not a service establishment because approximately half of its business was done for the government pursuant to navy contracts.....	5
A. The service establishment exemption is limited to establishments comparable in character to retail stores. Appellee's plant was not comparable to a retail establishment	5
B. Legislative history	6
C. Language and structure of exemptive provision.....	8
D. Judicial construction	9

III.

Appellees were not employees of a motor carrier whose duties affected safety of operations in interstate transportation.....	15
--	----

IV.

Appellees' counsel are entitled to further attorneys' fees on appeal	21
Conclusion	21

TABLE OF AUTHORITIES CITED

CASES	PAGE
Bracey v. Luray, 138 F. (2d) 8.....	13
Consolidated Timber Co. v. Womack, 132 F. (2d) 101....	10, 12, 14
E. H. Clarke Lumber Co. v. Kurth, 152 F. (2d) 941.....	21
Fleming v. A. B. Kirschbaum Co., 124 F. (2d) 567; aff'd 316 U. S. 517.....	7, 9, 13
Fleming v. Arsenal Bldg. Corp., 125 F. (2d) 278; aff'd 316 U. S. 517.....	8, 9, 13
Fletcher v. Grinnell Bros., 150 F. (2d) 337.....	15
Guess v. Montague, 51 Fed. Supp. 61.....	12, 13
Helliwell v. Haberman, 140 F. (2d) 833.....	15
Hutchinson v. Barry, 50 Fed. Supp. 292.....	19, 20
Kirschbaum Co. v. Walling, 316 U. S. 517.....	10
Levinson v. Spector Motor Service, 91 L. Ed. 846.....	16
Lonas v. National Linen Service Corp., 136 F. (2d) 433; cert. den. 320 U. S. 785.....	12, 13
Morris v. McComb, 92 L. Ed. 83.....	18, 19
Overnight Motor Co. v. Missel, 316 U. S. 572.....	12
Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.....	16
Republic Pictures Corp. v. Kappler, 151 F. (2d) 543.....	21
Rockton and Rion R. R. Co. Walling, 146 F. (2d) 111; cert. den. 324 U. S. 880.....	15
Roland Electrical Co. v. Walling, 66 S. Ct. 43.....	12, 13
Stanger v. Vocafilm Corp., 151 F. (2d) 894.....	21
United States v. American Trucking Associations Corp., 310 U. S. 554.....	12
United States v. Darby Lumber Co., 61 S. Ct. 451.....	12

	PAGE
Walling v. Gordon's Transports, 10 Lab. Cases, par. 62,934; aff'd 162 F. (2d) 203; cert. den. U. S., 68 S. Ct. 74....	15
Walling v. Sondock, 132 F. (2d) 77.....	10
Wood v. Central Sand & Gravel Co., 33 Fed. Supp. 40.....	13

MISCELLANEOUS

83 Congressional Record, pp. 7436-7438.....	10
83 Congressional Record, pp. 7437, 7438.....	6
83 Congressional Record, pp. 9178, 9266-9267.....	7
Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, Senate Bill 2475 and House Report 7200, June 2, 1937, p. 35.....	7
Senate Committee Bill 2475, Sec. 2(a)(7).....	6
Senate Committee Bill 2475, Sec. II(a)(1).....	6
Wage and Hour Release, No. T-31, February 6, 1942.....	12

STATUTES

Fair Labor Standards Act, Sec. 13(a)(2)	5, 6, 7, 8
Motor Carrier Act, Sec. 13(b)(1).....	15
Motor Carrier Act, Sec. 204.....	15

TEXTBOOKS

Commerce Clearing House, Labor Law Service, par. 25,551.03 (Wage and Hour First Annual Report (1939), p. 21).....	5
United States Census of Business (1939), Instructions to Enumerater for Business and Reference, p. 18.....	12
United States Census of Business (1939), Vol. 1, Retail Trade, p. 1	12
United States Census of Business (1939), Vol. 2, Wholesale Trade, p. 1.....	12

No. 11635.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMERY KEY, RICHARD MAGNUS, LEON T. MCCROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLEES' REPLY BRIEF.

Statement re Jurisdiction and re the Pleadings.

Appellees concur in the Appellant's Statement re Jurisdiction (Op. Br. p. 1) and in its statement of the pleadings (Op. Br. p. 3).

Statement of the Case.

During the period to which the appellees' claims relate, appellant was engaged in packing, crating, storing, and transporting household goods [amended complaint, R. p.

4; amended answer, R. p. 7; Finding of Fact IV, R. p. 14]. The appellees were employed as packers, craters, warehousemen, weighers, or stencilers and people whose job was a combination of driving and packing or helper. One was a mechanic's helper.

The crater (Armstrong) worked in the company's warehouse, crating household effects for long haul shipment [R. 78, 79].

The packers (Charette, Fisher, Holder, Magnus, McCrossen, Wolf, Vaughn)¹ generally drove to their place of work in a small truck in which they carried their packing materials. There they did the packing and left the packed goods for later pick-up by a moving van [R. pp. 55, 58, 198, 204-205]. Occasionally they rode to the place of work in the moving van, did their packing and sometimes helped load the packed goods into the van [R. pp. 227-228].

Approximately 75% to 80% of their time was spent in packing and the balance in driving to and from the houses in which they did their packing [R. pp. 203, 205, 230].

The driver-packers (Garcia, Graham, Key, Peterson, Smith) drove trucks to the houses, packed the goods, placed them in the trucks and drove them back to the warehouse [R. pp. 189, 85-86, 270-271]. They also delivered goods to the homes where they unpacked them.

¹The classification is necessarily inexact because some employees had combination duties and others worked in different jobs at different times.

The helpers (Savedra, White) did substantially the same, except that they seldom did any driving [R. pp. 214-215].

The warehousemen (Kanir, Key, Remus) performed the usual warehouse duties of storing goods brought in and taking goods from storage for shipment or delivery, weighing and stencilling.

The mechanic's helper (Wheeler) during one period assisted the mechanic in making repairs to the trucks [R. pp. 223-226], and the remainder of his employment he oiled, gassed and greased the trucks [R. p. 223].

None of these men did any driving across state lines or on long hauls. Their driving was confined to local trips between warehouse and house. Likewise, any loading performed by them was loading for the haul between the house and the warehouse, never on any trucks for long haul or out of state shipment.

During the entire period here involved, up to 60% to 75% of the appellant's work was performed under Navy contract [R. pp. 46, 51, 73, Deft. Ex. C] in which the Navy paid for the moving of household goods of its personnel. By dollar volume in six month periods, the business ranged from 45% to 60% government contract [R. pp. 142-145]. A flat rate per hundred pounds was charged for packing and shipping under the government contract, while individuals paid so much per hour for packing and so much per hour for shipping. [R. 166, Deft. Exs. G, H, I, J]. The Navy contracts were obtained by either negotiation or competitive bidding [Deft. Exs. G, H, I, J]. The appellees spent up to 100% of their time on this work.

Summary of the Argument.

I. The appellant was not a retail establishment because it made no retail sales.

II. The appellant was not a service establishment because the majority of its activities were performed for the United States Government pursuant to Navy contracts and a substantial portion of its business was for commercial and industrial customers.

III. None of the employees here involved, with the possible exception of the mechanic's helper and certain drivers, performed any duties affecting safety of operations. Appellant failed to show that any employee, including drivers and the mechanic's helper, performed any duties affecting safety of operations in interstate transportation. Appellant failed to show in which work weeks if any, any employee performed any duties affecting safety of operations in interstate transportation.

ARGUMENT.

I.

Appellant Was Not a Retail Establishment Because It Made No Retail Sales.

Section 13(a)(2) of the Fair Labor Standards Act of 1938 exempts from the overtime and minimum wage provisions . . . "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce . . ."

Obviously, a retail establishment is one making retail sales of merchandise, rather than one providing services. (See Wage and Hour First Annual Report (1939), page 21, summarized in Commerce Clearing House, Labor Law Service, para. 25,551.03.) Since appellant sold no merchandise, it was for that reason alone, not a retail establishment. In addition, it was not a retail establishment for the further reasons, discussed below, which prevent it being classified as a service establishment.

II.

Appellant Was Not a Service Establishment Because Approximately Half of Its Business Was Done for the Government Pursuant to Navy Contracts.

A. THE SERVICE ESTABLISHMENT EXEMPTION IS LIMITED TO ESTABLISHMENTS COMPARABLE IN CHARACTER TO RETAIL STORES. APPELLEE'S PLANT WAS NOT COMPARABLE TO A RETAIL ESTABLISHMENT.

The District Court found [R. pp. 17-18] that appellant's establishment was not a service establishment nor a retail establishment within the meaning of section 13(a)(2) of the Act. This finding was in accordance with the evidence and conformed to the construction of

the exemption adopted by the Administrator of the Wage-Hour and Public Contracts Divisions, United States Department of Labor. The Administrator's position is in accordance with the language and structure of the statutory provisions and is supported by the legislative history of the act.

B. LEGISLATIVE HISTORY.

The legislative history of the act demonstrates that the exemption was rooted in a desire to protect small retailers selling *directly* and primarily to the general consuming public. The original bills contained no exemption for retail or service establishments. Section 2(a)(7) of the Senate Committee Bill (S. 2475), passed by the Senate July 31, 1937, and by the House May 24, 1938, as Section II(a)(1), provided an exemption for employees working in a "local retailing capacity." But the apparent source of Section 13(a)(2) was an amendment offered by Representative Celler excepting "any retail industry, the greater part of whose sales is in intrastate commerce" which he proposed in order to dispel all doubt as to the exemption of "retail dry goods, retail butchering, grocers, retail clothing stores, department stores" (83 Cong. Rec. pp. 7437, 7438). The amendment passed the House but was never enacted. Other references to the status of retailers found in the Congressional debates and in the hearings conducted during consideration of the act, such as the statement of Mr. Justice Robert H. Jackson, then Assistant Attorney General, that the act was not intended to apply to the retailer, filling station attendant, and pants presser, indicate a uniform purpose to exclude the neighborhood merchant (Joint Hearings before the Senate Committee on Education and Labor and the House Com-

mittee on Labor on S. 2475 and H. R. 7200, June 2, 1937, p. 35).

The exemption in substantially its present form, appears for the first time in the confidential Conference Committee prints dated June 10, 11 and 12, 1938, respectively. These drafts excepted "any employee engaged in any *retail establishment* the greater part of whose selling is in intra-state commerce." (Italics supplied.) In the Conference Committee report dated June 11, 1938, the words "or-service" and "or servicing" were added (H. Rept. 2738, 75th Cong., 3d sess., 1938). Thus, the exemption as finally enacted appeared for the first time in the draft of the section contained in this final Conference Committee report. The explanation of the exemption in the report merely repeated the language of Section 13(a)(2) (*id.* at 32). The Conference Committee's version of the bill was adopted by both Houses of Congress on June 14, 1938 (83 Cong. Rec. 9178, 9266-9267), just three days after the language in question first appeared. The new language provoked no discussion on the floor of either the House or Senate.

The absence of expression or comment upon the modification indicates that no far-reaching extension of the original exemption for retail establishments was contemplated by the last minute addition of the words "or service." This legislative history was relied upon by the court in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572 (C. C. A. 3), affirmed, 316 U. S. 517, in refusing the exemption to the owner of a loft building who rented space to manufacturers.

The purpose of the addition was to make clear that the exemption included those closely related establishments which sell intangible services rather than merchandise,

such as barber shops, beauty parlors, home laundries, valet shops, service stations, and other analogous businesses dealing with private consumers. In regard to their customers, location, appearance, personnel, and hours of business, such establishments closely resemble the "retail establishment" with which they are grouped in the exemption. These two very similar kinds of establishments presented a common problem in framing the statute and it is reasonable to infer that Section 13(a)(2) provided a common solution. Clarification was probably regarded as necessary to dispel the connotation of selling goods rather than services which may have been attributed to the phrase "retail establishment."

C. LANGUAGE AND STRUCTURE OF EXEMPTIVE PROVISION.

The view that the exemption extends only to service establishments retail in nature is buttressed by the grammatical construction of the exemption itself. Not only are the related terms coupled in the same sentence, they are used in the disjunctive, modify the same word "establishment" and the same criterion of intrastate commerce applies to each. It was natural, therefore, for the Administrator and the courts to conclude that service establishments and retail establishments should be similarly limited to those who deal *directly* with the consumer, for, as stated by Circuit Judge Learned Hand, "the juxtaposition of retail selling and 'servicing' does indeed suggest as much." *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280 (C. C. A. 2), affirmed, 316 U. S. 517.

D. JUDICIAL CONSTRUCTION.

The United States Supreme Court and all Circuit Courts of Appeals that have passed upon the question have indicated that the service establishment exemption is comparable in scope to the exemption for retail establishments.

The Second Circuit in *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 278, 280, in denying the exemption to the owner of a loft building which rented space and provided other services to its tenants, said:

“* * * Possibly it is not a ‘service establishment’ at all; perhaps that phrase should be limited to those who serve consumers directly, like tailors, or garages, or laundries; the juxtaposition of retail selling and ‘servicing’ does indeed suggest as much.”

The Third Circuit in *Fleming v. A. B. Kirschbaum Co.*, 124 F. (2d) 567, 572-573, under facts virtually the same as in the *Arsenal* case, after referring to the legislative history, stated:

“* * * From this it is fair to infer that the type of establishment meant is that which has the ordinary characteristics of a retail establishment except that it sells services instead of goods. In other words it is an establishment the principal activity of which is to furnish service to the consuming public. Typical retail establishments are grocery stores, drug stores, hardware stores, and clothing shops. In *Wood v. Central Sand & Gravel Co.*, D. C. W. D. Tenn. 1940, 33 F. Supp. 40, 47, the court suggested as illustrations of what Congress meant by service establishments ‘barber shops, beauty parlors, shoe-shining parlors, clothes pressing clubs, laundries, automobile repair shops.’ We think these illustrations apt.”

In *Kirschbaum Co. v. Walling*, 316 U. S. 517, the Supreme Court affirmed the judgments in both cases, stated that the asserted exemption "need not detain us long," and held (p. 526):

"The petitioners' buildings cannot be regarded as 'service establishments' within the exemption of Sec. 13(a)(2). Selling space in a loft building is not the equivalent of selling services to consumers * * *."

The Fifth Circuit, in *Walling v. Sondock* (1942), 132 F. (2d) 77, recognized that the service-establishment exemption was limited to concerns performing services of a retail character. The court "upon the authority of *Kirschbaum v. Walling*, and by analogous reasoning," denied the exemption to a detective agency which furnished guards and watchmen to commercial and industrial customers. The opinion contained a footnote reference to portions of the legislative history described above and to the pages of the Congressional Record (83 Cong. Rec. 7436-7438) which included Representative Celler's statement of intention to exempt "retail dry goods, retail butchering, grocers, retail clothing stores, department stores."

Similarly, the Ninth Circuit, in *Consolidated Timber Co. v. Womack* (1942), 132 F. (2d) 101, denied the exemption to "cookhouses" provided by a lumber company for the convenience of its employees. The court was of the opinion "that an ordinary restaurant or eating place 'renders a service' rather than 'makes a sale,' and that a restaurant is a 'service' rather than a 'retail' establishment." It held, however, that the employer was not entitled to the exemption for the reason, among others, that (p. 1011):

"* * * The principal activity of the cookhouse definitely, was not to furnish service to the consuming

public, as such, but was to serve the employees of the Company.”

So here the principal activity of appellant was not to furnish service to the consuming public, as such, but was to serve the personnel of the Navy.

The evidence clearly establishes in this case that for the period in question approximately one-half of appellant's business was work directly for the Navy² under annual contracts obtained by bids or negotiated with the Navy wherein the appellant undertook to move goods belonging to Navy personnel at fees and prices established by the contracts. These fees and prices were different from those charged to the individual customer. The Administrator of the Wage-Hour and Public Contracts Division has taken the official position that firms engaged in moving and storing household goods are not retail or service establishments if they serve governmental agencies. “Some warehousemen handle goods for private individuals but in addition they serve governmental agencies, institutions, industrial or business concerns and others who are removed from ‘the private individual’ category. Work of this kind is usually performed on a large scale frequently following contract bidding and almost always at prices lower than those charged private customers; transactions of this kind are not exempt. If the gross receipts from non-exempt work becomes ‘substantial’—that is if such receipts exceed twenty-five percent of the gross receipts of the establishment—the establishment will no longer be

²Moreover, during the entire period here involved, appellant held itself ready and agreed to devote 100% of its man-hours and facilities to the government work [Def. Exs. E (p. 15), G (p. 8), H (p. 11), and I].

considered as a service establishment and if any part of its business is interstate, its employees will be subject to the act." Wage and Hour Release, No. T-31, February 6, 1942.³

This position conforms to other governmental usage. For example, the Bureau of the Census classifies as wholesale sales, "sales of goods or merchandise to trading establishments of all kinds, to institutions, industrial, commercial and professional users and sales to governmental bodies." (U. S. Census of Business, 1939, Instructions to Enumerator for Business and Reference, p. 18; also Volume 1 Retail Trade, p. 1; Volume 2 Wholesale Trade, p. 1.) See also *Roland Electrical Co. v. Walling*, 66 Sup. Ct. 43 referring to said classification.

In opposition to these clearcut pronouncements, appellant relies upon *Lonas v. National Linen Service Corp.*, 136 F. (2d) 433, cert. den. 320 U. S. 785, and the District Court decision in *Guess v. Montague*, 51 Fed. Supp. 61.

Whatever persuasiveness the *Lonas* case may previously have had in this circuit in the face of the contrary principles adopted by this court in *Consolidated Timber Co. v. Womack* (1942), 132 F. (2d) 101, it is no longer entitled to any consideration in view of the decision of the

³While the official position taken by the administrator is indicative of the manner in which he intends to enforce the law and therefore not binding upon the courts, nevertheless the Supreme Court has held that the interpretations expressed by him are entitled to great weight and should be followed in the absence of a clear demonstration of their error. See *U. S. v. American Trucking Associations Corp.*, 310 U. S. 554; *U. S. v. Darby Lumber Co.*, 61 Sup. Ct. 451, 459; *Overnight Motor Co. v. Missel*, 316 U. S. 572.

Supreme Court in *Roland Electrical Co. v. Walling* (1946), 66 S. Ct. 413.⁴

Guess v. Montague, 51 Fed. Supp. 61, was reversed by the Circuit Court of Appeals, Fourth Circuit, 140 F. (2d) 500.

In *Wood v. Central Sand & Gravel Co.*, 33 Fed. Supp. 40, also relied upon by appellants, the court held the exemption inapplicable, saying,

“Nor could such supply house be deemed a retailer, when the major portion of its sales—many in bulk lots—were made to a city of more than 250,000 inhabitants, to a large State, to an important Governmental agency, the Works Progress Administration, and to many contractors who use the material in their construction work.”

Thus, it is uniformly recognized that sales or service to the government or an agency thereof are not within the contemplation of the exemption. It is immaterial that the Navy in this case was providing the facilities for its personnel so that the situation by its nature required appellant to pack, move and store household effects belonging to individual enlisted men and officers. The determining factor is that the work was ordered and provided by the

⁴The Court stated that *certiorari* was granted because of the divergence of opinions among the Circuit Courts, and in its footnote referred to the *Lonas* case as opposed to such cases as *Fleming v. Kirschbaum Co.*, 124 F. (2d) 567, 572; *Fleming v. Arsenal Bldg. Corp.*, 125 F. (2d) 279, 280; *Guess v. Montague*, 140 F. (2d) 500; and *Bracey v. Luray*, 138 Fed. (2d) 8. By enunciating the principles which had been followed in the latter cases, the Supreme Court thereby indicated that the *Lonas* decision was erroneous.

Navy for its own purposes to facilitate its own part in the prosecution of the war. The movement of the men, and with them their belongings, was to accomplish the government's purposes and did not serve any individual needs of the men.

Moreover, it appears that over 11% in dollar volume, of appellant's business was derived from commercial, industrial and business customers (including some government work other than Navy personnel). [Deft. Ex. C.]

Accordingly, whether or not appellant extended any personal "services" to its private customers or to the Navy personnel during this period⁵ is immaterial. As this court recognized in *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, a restaurant may be a retail or service establishment, but if it substantially serves an industrial purpose, it is not such an establishment within the meaning of the exemption. As the authorities hold, the same distinction exists where the operation serves a governmental purpose.

Accordingly, since half of appellant's business was performed for the Navy, at contract prices set by annual contracts, and since an additional 11% of its business was derived from industrial, business and commercial customers, appellant was not a service establishment.

⁵It appears from the testimony of appellant's secretary summarized on pages 14 and 15 of Appellant's Opening Brief that he was describing activities at the time of trial, not at the times here involved. In any event it is clear that he was not describing activities related to movement of Navy personnel goods.

III.

**Appellees Were Not Employees of a Motor Carrier
Whose Duties Affected Safety of Operations in
Interstate Transportation.**

The court below found that none of the appellees devoted a substantial portion of his time to activities which would bring him within the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service under the provisions of Section 204 of the Motor Carrier Act.

As with the retail and service establishment exemption and each of the other exemptions from the minimum wage or overtime provisions of the Fair Labor Standards Act, the exemption created by Section 13(b)(1) of that act is subject to strict construction against those claiming the exemption.

Walling v. Gordon's Transports (W. D. Tenn. 1945), 10 Labor Cases, par. 62,934, aff'd *per curiam* (C. C. A. 6, 1947), 162 F. (2d) 203, cert. den.U. S., 68 S. Ct. 74;

Fletcher v. Grinnell Bros. (C. C. A. 6, 1945), 150 F. (2d) 337.

The burden of proof is upon the appellant claiming the exemption to establish by a preponderance of the evidence the facts which clearly demonstrate that the employees are within the exemption.

Walling v. Gordon's Transports (W. D. Tenn., 1945), 10 Labor Cases §62,934, aff'd *per curiam* (C. C. A. 6, 1947), 162 F. (2d) 203;

Rockton and Rion R. R. Co. v. Walling (C. C. A. 4, 1944), 146 F. (2d) 111, cert. den. 324 U. S. 880;

Helliwell v. Haberman (C. C. A. 2, 1944), 140 F. (2d) 833.

In order to demonstrate this proposition, the appellant must have established by a preponderance of the evidence that each of the appellees devoted a substantial part of his time to activities which directly affect the safety of the operation of motor vehicles in interstate transportation.

Levinson v. Spector Motor Service, 91 L. Ed. 846;

Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.

“If none of the alleged ‘loading’ [similarly driving, helping and mechanical work] activities of the respective respondents during the period at issue come within the kind of activities which, according to the commission, affect the safety of operation of motor vehicles in interstate or foreign commerce within the meaning of the Motor Carrier Act, then those respondents of which that is true are entitled to the benefits of Section 7 of the Fair Labor Standards Act.”

Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869, 875.

Further as the Supreme Court pointed out in the *Pyramid Motor* case, the title by which the employee is classified by himself or his employer is not determinative. The question before the District Court was whether the activities of the employees were the kind of activities which are held by the Interstate Commerce Commission to affect safety of operation.

As to certain of the employees, there is no evidence that any of their activities affected safety of operations and all of the evidence showed they did not. These include the following employees:

Craters: Armstrong, Savedra [3½ months, Tr. 186];

Warehousemen: Kanier, Key, Holder,⁶ Remus;

Oiler and greaser: Wheeler (January through March, 1944);

Packers: Charette, Fisher, McCrossen, Wolf.

As to certain other employees, an attempt was made to create an inference that their activities affected safety of operations, because they either drove trucks, rode with the drivers or helped to load. These are primarily the remaining packers: Holder, Magnus, Vaughan.

Careful examination of the record, however, discloses that the inconsequential driving, helping or loading done by these men was not in interstate transportation. These packers operated with small pickup trucks carrying only their packing materials. They did not carry any of the household goods shipped in interstate commerce [Holder, Tr. pp. 211-215; Magnus, Tr. pp. 226-236;⁷ Vaughan, after the first six weeks, Tr. pp. 198-203].

⁶From January 5, 1945, to July 18, 1946 [Tr. pp. 212, 214.]

⁷This employee at one time made a few trips to San Francisco [Tr. p. 230].

Since the decision below (and after appellant filed its Opening Brief) the Supreme Court decided the case of *Morris v. McComb*, 92 L. Ed. 83. This was an action by the Administrator of the Wage-Hour and Public Contracts Divisions, to enjoin violations of the Fair Labor Standards Act with respect to motor carrier drivers and mechanics. The driving (or repair work) of these employees in interstate transportation was but a small percentage of their total driving (or repair work) time—an average of 4%—the balance being spent in intrastate driving (or repair work). The court, pointing out that any of these employees might be called upon to spend a considerable portion of his time in interstate driving (or repair work), held that all were subject to regulation by the Interstate Commerce Commission. The court was at pains to state that the “strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of *other like driving services* rendered by them otherwise than in interstate commerce” (p. 90, emphasis added).

In the case at bar, there were no “full-time drivers” as that phrase was used by the Supreme Court in the *Morris* case. The employees here who did any driving spent most of their time in packing household goods in crates and boxes.

With respect to the above mentioned employees and all of the remaining employees, the appellant has failed to

meet its burden of proof as to this exemption in two essential respects.

In the first place, it has not shown the extent to which the various employees devoted themselves to work which might bring them within the exemption. The Supreme Court in the *Morris* case said, "If this were an action to recover overtime compensation for individual employees, it would be necessary to determine that fact." The case before the court now is one to recover overtime compensation for individual employees.

The court below carefully considered all of the evidence and found that no sufficient showing had been made as to the extent to which, if at all, any of the appellees were engaged in activities affecting the safety of operations in interstate transportation.

Secondly, it was the burden of the appellant to establish by a preponderance of the evidence the work weeks, if any, in which any of the appellees were engaged in such activities.

The applicability of any exemption, like the general coverage of the Fair Labor Standards Act is on a week-to-week basis.

Hutchinson v. Barry (D. C. Mass., 1943), 50 Fed. Supp. 292.

The court concluded in that case:

"... the defendant on the most favorable assumptions can have the benefit of the exemption afforded by

Sec. 13(b) only for those particular weeks in which the defendant sustains the burden of showing that the employee spent a substantial part of his time at activities connected with safety of operations. But that is just what the defendant has not proved. It has no records showing the division of the plaintiff's work week by week, and the evidence is so generalized that no precise finding can be made."

That is precisely the situation here. The appellant patently failed to show that any employee was exempt in any work-week.

The *Hutchinson* decision follows precisely the holding of the Interstate Commerce Commission in such a case:

"If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week he is not subject to the (qualifications and maximum hours of service) regulations herein prescribed during that week."

Ex Parte No. MC-3, 23 M. C. C. (F) 1, 39.

In order to avoid the effect of this conclusion, appellant argues that the summary of its witness Diegel as to the contents of certain records from one day in each of five weeks in July and August, 1945, "is representative of the activities of all of the appellees." Obviously from such sketchy and incomplete information, the court below was obliged to find as it did that the appellant had not shown that any of the appellees were within the exemption.

IV.

Appellees' Counsel Are Entitled to Further Attorneys' Fees on Appeal.

It is the function of this court to fix a reasonable sum as the value of the legal services rendered to the appellees by their counsel upon this appeal.

E. H. Clarke Lumber Co. v. Kurth (C. C. A. 9, 1945), 152 F. (2d) 941;

Republic Pictures Corp. v. Kappler (C. C. A. 8, 1945), 151 F. (2d) 543;

Stanger v. Vocafilm Corp. (C. C. A. 2, 1945), 151 F. (2d) 894.

Counsel for appellees respectfully request that an order be made that appellant be required to pay an additional sum in an amount determined by the court for the services of appellees' attorneys on this appeal.

Conclusion.

The appellant seeking to bring itself within the retail or service establishment exemption and the motor carrier exemption of the Fair Labor Standards Act has failed to meet its burden of proof with respect to either. It has not, as it was required to do, established by the preponderance of the evidence that it was a retail or service establishment or that any of its employees were engaged in any activities affecting the safety of operation of motor vehicles in interstate transportation.

On the contrary, the evidence clearly demonstrates that during the period involved appellant's principal business was with the United States Navy, and that in fact it had agreed and stood ready to devote 100% of its activity to the performance of the Navy contracts. It also shows

that a substantial portion of its business (over 11%) was from commercial, industrial and business customers. Under those facts it was not a retail or service establishment exemption.

The evidence also establishes positively and affirmatively that at least Armstrong, Kanir, Key, Remus, Charette, Fisher, McCrossen and Wolf at no time performed any duties affecting safety of operations of motor vehicles. It also shows that for certain periods Savedra, Holder, and Wheeler engaged in no such activities.

With respect to the remaining employees the evidence fails completely to show that any of them devoted any substantial portion of their time in such activities. Moreover it cannot be determined from the evidence in which work weeks if at all any such activities might have been performed. The evidence therefore abundantly supports the findings of the trial court that none of the appellees were within the motor carrier exemption.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed, and that this court award appellees' counsel a reasonable attorney's fee for their services on this appeal.

CHARLES E. BEARDSLEY,
HERBERT V. WALKER,
PERRY BERTRAM,

Attorneys for Appellees.

No. 11635
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE
GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR,
EMORY KEY, RICHARD MAGNUS, LEON T. MCGROSSEN,
GEORGE W. PETERSON, THOMAS P. REMUS, JOE P.
SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE
F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S REPLY BRIEF.

JOHN W. PRESTON and
PRENTISS MOORE,

MAR 1 - 1945 458 South Spring Street, Los Angeles 13,

Attorneys for Appellant.

FILE
MAR 1 - 1945
PAUL P. O'BRIEN,

TOPICAL INDEX.

PAGE

I.

Appellant was a service establishment within the meaning of the Fair Labor Standards Act of 1938.....	2
---	---

II.

Appellant did not cease to be a service establishment because a portion of its servicing was done for Navy personnel under a contract with the Navy Department.....	4
---	---

III.

Appellees were employees of a motor carrier and engaged in activities, a substantial part of their time, involving safety of operations in interstate commerce.....	10
A. Detailed activities showing that appellees engaged in work involving safety of operations in interstate commerce.....	17
(1) Drivers and drivers' helpers.....	17
(2) Loaders and unloaders.....	18
(3) Mechanics and their helpers.....	18
(4) Packers and unpackers.....	19

TABLE OF CASES AND AUTHORITIES CITED.

CASES.	PAGE
Consolidated Timber Co. v. Womack, 132 F. (2d) 101.....	8
Garratt v. Baker, 5 Cal. (2d) 745.....	5, 6
Hunt v. Nat'l Linen Serv. Corp., 178 Term 262, 157 S. W. (2d) 608	8
Kirschbaum v. Walling, 316 U. S. 517.....	9
Lonas v. National Linen Service Corp., 136 F. (2d) 433, 150 A. L. R. 697, 320 U. S. 735, 64 S. Ct. 157, 88 L. Ed. 472.....	8
Morris v. McComb, 92 L. Ed. 83.....	11, 14, 19, 20
Roland Electrical Co. v. Walling, 326 U. S. 657, 66 S. Ct. 413.....	9
Walling v. Sondock, 132 F. (2d) 77.....	8
Walling v. Morris (6 Cir.), 92 L. Ed. 85.....	12

STATUTES

Civil Code, Sec. 1559.....	5
Fair Labor Standards Act (29 U. S. C. A., Sec. 207).....	10
Fair Labor Standards Act (29 U. S. C. A., Sec. 213(b)).....	10, 15, 19
Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 213(a) (2))	2, 3, 7, 11
Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 304(a)(1)).....	10

TEXTBOOKS

150 American Law Reports Annotated 700, 701.....	8
6 Cal. Jur. 471.....	6
17 Corpus Juris Secundum 1121 et seq.....	5, 6

No. 11635

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KANIR, EMORY KEY, RICHARD MAGNUS, LEON T. MCGROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS, JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN, NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS WOLF,

Appellees.

APPELLANT'S REPLY BRIEF.

Appellees make only two points in their brief (Points II, page 5, and III, page 15), which require notice and discussion by appellant. These two points are:

(1) "Appellant was not a service establishment because approximately half of its business was done for the government pursuant to navy contracts"; and

(2) "Appellees were not employees of a motor carrier whose duties affected safety of operations in interstate transportation."

I.

**Appellant Was a Service Establishment Within the
Meaning of the Fair Labor Standards Act of 1938.**

Appellees carefully refrain from saying that appellant was not engaged in the business of rendering services, as that term is used in the Fair Labor Standards Act of 1938 (29 U. S. C. A., Section 213(a)(2).) The allegations of appellees' complaint, the findings of the Court and the evidence show beyond question that appellant's sole business was the rendering of certain services to any and all members of the public desiring them. It is proper to again call this Court's attention to Finding No. IV [R. 14-15] in part, as follows:

“That . . . since August 15, 1942, defendant (appellant) has been engaged in the business of packing, crating, storing, handling, and working on goods, wares, commodities and merchandise” of others.

The finding, *supra*, follows closely the language of the complaint. The evidence fully supports it.

The mere reading of this finding is sufficient to show that appellant did nothing except to render services to and for others, hence it was a service establishment in fact and as contemplated by the Act.

In this connection the Court found (Finding No. IV):

“. . . the Court adopts the figures arrived at on an average taken from an analysis of the defendant's (appellant's) records presented in the defendant's

testimony, which showed $55\frac{1}{3}$ per cent intrastate and $44\frac{2}{3}$ per cent interstate business." [R. 15.]

It thus appears, first, that all of appellant's business was servicing and, second, that $55\frac{1}{3}$ per cent of such business was *intrastate*. This being true, the service establishment exemption contained in Section 13(a)(2) of the Act (29 U. S. C. A., Section 213(a)(2)) was applicable, since said section provides:

"The provisions of Sections 206 and 207 of this title (29 U. S. C. A.) shall not apply with respect to . . . (2) any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

What, then, is the real contention of the appellees in respect to the service establishment exemption claimed by appellant? It seems to be this: that because appellant rendered services to hundreds, perhaps thousands, of men in the Navy in the packing, crating, hauling, storing and transporting of their household goods and personal effects, under a contract with the Navy Department, appellant thereby ceased to be a service establishment within the meaning of the Act. We assert that this contention is demonstrably unsound.

II.

**Appellant Did Not Cease to Be a Service Establishment
Because a Portion of Its Servicing Was Done for
Navy Personnel Under a Contract With the
Navy Department.**

Appellees erroneously stated that "approximately half of its (appellant's) business was done for the government . . ." Upon this erroneous statement they premise their subsequent argument and conclusion. What are the facts?

World War II involved the movement of millions of men, and in many instances, their families and their household goods and effects, from one part of the country to another and to and from foreign countries. Within prescribed limits, the Government paid for the transportation of these men and their families and for the packing, hauling, handling, storing and transportation of their household goods and effects. The Navy Department, of course, provided for the rendition of such services to its personnel. *This constituted a part of their total compensation from the Government.*

The contracts entered into between the Navy Department and appellant [See Defendant's Exhibits E, F, G, H, I and J] provided that appellant should render services to and for individual members of Navy personnel, and where loss or damage to goods occurred, appellant was responsible to such personnel, not to the Government. The "General Specifications" of the contract [Exhibit I] provide in this behalf:

"Section 20, *Contractor's Responsibility.*

"The Contractor shall be responsible to the *owner* of any effects over which it has control or custody under this contract for any and all loss or damage to such effects while in its control or custody. . . .

“In addition, the Contractor shall be responsible to the *owner* of any effects which it handles pursuant to this contract for any and all loss or damage to such effects resulting from the Contractor’s improper performance under this contract. . . .

“For any loss or damage for which the Contractor is responsible hereunder the Contractor shall make prompt payment to the *owner* of the effects lost or damaged.” (Italics ours.)

The “General Specifications” (Section 18) of the contract further provide:

“When effects are hauled under a Government order at Government expense to the Contractor’s warehouse for storage at the *owner’s* expense, there shall be no charge to the Government for handling or terminal charges in or out of such warehouse. The warehouse receipt and the contract given the *owner* shall comply with this provision.” (Italics ours.)

These and other provisions of the contract show that it was made primarily, indeed exclusively, for the benefit of the men in the Navy. Thus it was, in law and in fact, a third party contract, as clearly evidenced by the provisions thereof making appellant liable to the owner, that is to say, to any individual member of Navy personnel whose goods were serviced by appellant. (See 17 C. J. S. 1121 *et seq.*; *California Civil Code*, Section 1559; *Garratt v. Baker*, 5 Cal. (2d) 745, 748, and cases cited.)

It is said in 17 C. J. S. 1121:

“The prevailing view in the United States permits a third person for whose benefit a contract was made to sue thereon even though he is a stranger to the contract and the consideration therefor.”

Numerous Federal cases, as well as State cases, are cited in footnote 3 (*id.*) in support of the text.

In *Garratt v. Baker*, 5 Cal. (2d) 745, the Supreme Court of California said, at page 748:

“A third party may enforce a contract where he shows that he is a member of a class of persons for whose benefit it was made (citing cases).”

See, also, 17 C. J. S., 1134, stating that:

“Except as statute may provide otherwise, it is not necessary that the contract be for the exclusive benefit of the third person to enable him to sue thereon.”

An excellent statement in reference to a third party contract is made in 6 Cal. Jur. 471, where the authors say:

“It (the rule) does not rest upon the ground of any actual or supposed relationship between the parties, as some of the earlier cases seem to indicate, but upon the broad and more satisfactory basis that the law, operating upon the acts of the parties, creates the duty, *establishes a privity*, and implies the promise and obligation on which the (third party) action is founded. While such a contract remains unrescinded, *the relations of the parties are the same as though the promise had been made directly to the third party.*” (Italics ours.)

Reference to the evidence shows that appellant did no servicing whatsoever for the Government. All servicing under its contract with the Navy Department was done by appellant for individuals, who were members of Navy personnel.

Typical of this servicing is the following example: A naval officer is transferred from California to the Atlantic Seaboard; appellant's employees take a pick-up truck to the officer's house in Los Angeles, with boxes, barrels,

and packing materials; these employees pack dishes, silverware, household goods and personal effects into these boxes, barrels, etc., and haul the same to appellant's warehouse, where these boxes and barrels are marked or stenciled, and loaded into railroad freight cars, or motor trucks, for interstate shipment, and are delivered to the interstate carrier. Or, the order might be the reverse, that is appellant would receive an interstate shipment of such goods from an interstate carrier for delivery to the naval officer at his residence in Los Angeles, whereupon the goods were loaded into appellant's trucks, transported to such residence, placed therein in the manner and to such extent as the officer's wife might direct.

These services were of a personal or individual character, and were rendered to the officer himself, not to the Government. Such services were not rendered in bulk, but always for a particular individual, each such individual being wholly separate and apart from all others. Obviously, the example of servicing stated, *supra*, affords no basis whatever for appellees' claim that such servicing was for the Government.

It is worth noting that appellees do not mention a single instance where Government or Naval goods were serviced under the contract in question, nor can they do so.

Appellees argue at some length (their brief, pp. 5-14) that appellant's servicing was not of a retail character, *i. e.*, not with or for the consumer, but rather of a wholesale character; hence, they say, it does not come within the provisions of the service exemption set forth in Section 13(a)(2) of the Act (29 U. S. C. A., Section 213(a)(2).) The fallacy of the argument is demonstrated by the very nature of the services rendered, as above set forth—such services in every instance being at retail, that is, for the individual owner of the goods.

It is true that some Courts have held that the service establishment contemplated by the act is one that, somewhat like a retail store, serves customers indiscriminately as a business and performs work or labor on the person or property of the customer. This holding was pointed out and the cases cited in appellant's opening brief (pp. 10-13). Other decisions, however, hold that the rendition of service to industrial and commercial consumers, as distinguished from individual consumers, does not make such establishment any the less a service establishment. (See *Lonas v. National Linen Service Corp.*, 136 F. (2d) 433, 150 A. L. R. 697-Pet. for Cert. denied 320 U. S. 735, 64 S. Ct. 157, 88 L. Ed. 472; *Hunt v. Nat'l Linen Sev. Corp.*, 178 Term 262, 157 S. W. (2d) 608; Anno. 150 A. L. R. 700, 701.) Under the facts of this case, however, it is immaterial whether the latter type of servicing shall, or shall not, hereafter be held within the exemptive provisions of the Act, since it cannot be denied that appellant's business was to serve any and all members of the public requiring its servicing, and that the servicing done under the Navy contract was for individual members of the public.

The cases cited by appellees on this point are not applicable to the case at bar.

In *Consolidated Timber Co. v. Womack*, 132 F. (2d) 101, this Court held that the operation of cookhouses by a logging concern, at cost, for the convenience of its employees, and not to serve the public, was not within the service exemption of the Act. There is an obvious distinction between that case and the instant case.

In *Walling v. Sondock*, 132 F. (2d) 77, the Court (5th Circuit) held that the furnishing of guards and watchmen by a detective agency to commercial and industrial

establishments did not bring the agency within the service exemption, apparently because the concerns to which services were rendered were not of a retail character. The Court stated no reasons for its conclusion other than that it was "upon the authority of *Kirschbaum v. Walling*," 316 U. S. 517. But, the latter case merely held that the owners of loft buildings, which were leased to tenants engaged in the production of goods for interstate commerce, were not entitled to claim the service exemption. The following language of the Court explains its decision (*id.* p. 526):

"Selling space in a loft building is not the equivalent of selling services to consumers, and, in any event, the 'greater part' of the 'servicing' done by petitioners here is not intrastate commerce."

Appellees insist that *Roland Electrical Co. v. Walling*, 326 U. S. 657, 66 S. Ct. 413, is decisive of the point in question. In that case, however, the facts recited by the Court show that 99% of the company's 1000 accounts were with industrial or commercial firms (*id.* p. 661), for whom the company did "commercial and industrial wiring" (*id.* p. 678). The Court said of these customers:

"These are not retail customers in the same sense as is the customer of the local merchant, local grocer or filling station operator who buys for his own personal consumption." (*Id.* p. 678.)

No such situation is presented here. The individual members of Naval personnel whose goods were serviced are analogous to the customers of the retail merchant—they are individuals, as distinguished from commercial and industrial concerns, and it was their personal and individual goods that were serviced by appellant, not goods in bulk, not goods of the Government or of the Navy.

III.

Appellees Were Employees of a Motor Carrier and Engaged in Activities, a Substantial Part of Their Time, Involving Safety of Operations in Interstate Commerce.

Appellees concede that appellant was, at all times involved in this action, a motor carrier within the meaning of the Motor Carrier Act of 1935 (49 U. S. C. A. 304), and that appellant's business was both intrastate and interstate. The Court found that $44\frac{2}{3}$ per cent of appellant's business was interstate. [Finding No. IV, R. 14-15.] Under these and other facts of the case, there can be no doubt that the Interstate Commerce Commission had the jurisdiction and power to regulate appellant in respect to the "qualifications and maximum hours of service of (its) employees (appellees), and safety of operation and equipment." (49 U. S. C. A., Section 304(a)(1).) This being true, the provisions of Section 7 of the Fair Labor Standards Act (29 U. S. C. A., Section 207) were not applicable to appellees, as clearly shown by Section 13 of said Act (29 U. S. C. A., Section 213(b)) which provides:

"The provisions of Section 207 of this title (Title 29 U. S. C. A.) shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49."

The gist of appellees' contention, *i. e.*, that appellees were not engaged in activities involving safety of operations in interstate commerce, appears to be: (1) that the trial court found that none of appellees devoted a substantial part of his activities to such operations; (2) that the Act is subject to strict construction against those claiming

the exemption; (3) that appellant has the burden of showing as to each appellee that he engaged each week, a substantial part of his work time, in such operations; and (4) that appellant has failed to meet that burden.

In its opening brief (pp. 19-20) appellant set forth the various activities of the employees of motor carriers which the Interstate Commission and the Courts have held to bring such employees within the regulatory powers of the Commission, as provided in 49 U. S. C. A., Section 304(a)(1). These are:

- (1) Drivers of motor trucks;
- (2) Drivers' helpers;
- (3) Loaders who load, unload, or transfer freight between motor vehicles;
- (4) Mechanics who work on such vehicles used in interstate commerce;
- (5) Checker or Terminal Foreman doing or directing the loading of freight for interstate motor carrier; and,
- (6) Yard drivers and their helpers, mechanics, and loaders who perform work involving safety of operations and equipment, including those who inspect and remedy defects in trailers.

We believe these also include packers and craters of goods for shipment by motor truck in interstate commerce, since the manner in which goods are packed and crated in boxes, crates, and other containers will certainly affect other procedures such as loading, handling, and transporting them.

Since the filing of appellant's opening brief, the Supreme Court of the United States has decided the case of *Morris v. McComb*, 92 L. Ed. (Adv. Op.) 83, originally

instituted as *Walling v. Morris* (6 Cir). The Supreme Court stated the questions involved therein as follows (*id.* p. 85) :

“The first question is whether the Interstate Commerce Commission has the power, under Sec. 204 of the Motor Carrier Act of 1935, to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce*, are distributed generally, throughout the year, constitute 3% to 4% of the carrier’s total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate commerce*. The other question is whether, if the Commission has that power, the overtime requirements of Sec. 7 of the Fair Labor Standards Act of (June 25) 1938 apply to such employees in view of the exemption stated in Sec. 13(b)(1) of that Act. We hold that the Commission has the power in question and that the overtime requirements of Sec. 7 of the Fair Labor Standards Act therefore do not apply to such employees.”

The Court said that it granted certiorari limited to the following question (*id.* p. 86) :

“2. Where such employees (*i. e.*, those of a common carrier for hire who conducts a general cartage business) during a minority of their time are engaged in the transportation of interstate traffic are

they exempt under the provisions of Section 13(b) (1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U.S.C. Sec. 301, *et seq.*)?”

The nature and extent of the several phases of the cartage service rendered by the motor carrier are stated by the Court as follows (*id* p. 87):

“He was prepared to and did render general cartage service to the general shipping public. In 1941, he rendered such service to 47 consigning firms, but about 97% of his revenue came from the Great Lakes Steel Corporation and the Michigan Steel Corporation, both in Ecorse. His general cartage services, in 1941, were made up of three intermingled types of service, generally classifiable as follows on the basis of the revenue derived from them: (1) 35%: Transportation of steel largely within steel plants. This was transported for further processing in those plants and an unsegregated portion of it was shipped ultimately in interstate commerce. (2) 61%: Transportation between steel mills and industrial establishments. These shipments consisted principally of bumper stock, fender stock and other types of steel used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce. (3) 4%: Transportation of miscellaneous freight directly in interstate commerce,

either as part of continuous interstate movements or of interstate movements begun or terminated in metropolitan Detroit.”

The most striking part of the Court’s decision is, that only 3% to 4% of the employees’ activities were in interstate commerce and this was held to be substantial and sufficient under the Motor Carrier Act to bring such employees within the jurisdiction of the Interstate Commerce Commission, and likewise to exempt such employees from the wage and hour provisions of the Fair Labor Standards Act. This holding completely sustains the position taken by appellant in its opening brief (pp. 20-21) that character of activities, as distinguished from time spent by the employee therein, determines whether an employee is engaged in work involving safety of operations in interstate commerce.

The decision in the *Morris* case, *supra*, negatives appellees’ contention that it was necessary for appellant to show that each “employee was exempt in any work week.” (Appellees’ Br. p. 20.) In this connection the Court said (*id.* p. 90):

“However, apparently in the normal operation of the business, these strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. These trips were thus a natural, integral and apparently inseparable part

of the common carrier service of the petitioner and of his drivers.

“One or more such trips were taken by one or more drivers each week. The average number of drivers making one or more such trips in each week was nine drivers out of 37, or 24.4%. There were six weeks in which more than half of the drivers thus engaged directly in interstate commerce. The highest percentage of drivers making such trips in one week was 78.1%, when 25 drivers, out of the 32 then on duty, did so. As to the distribution of such trips, throughout the year, among the total of 43 drivers, every driver, except two, made at least one such trip with interstate freight.” (Italics ours.)

The italicized language just quoted is too clear to be misunderstood. It shows that “one or more such trips (that is, trips carrying interstate freight) by one or more drivers each week” was sufficient to include all of the carrier’s 43 drivers within the exemption, where it also appears that the drivers throughout the year shared indiscriminately the duty of driving on such trips.

It thus appears that very little activity in work involving safety of operations, within the meaning of 29 U. S. C. A., Section 213(b)(1) and 49 U. S. C. A., Section 304(2), is required to bring an employee so engaged within the exemption under discussion. But for the holding in the *Morris* case, *supra*, the *de minimis* rule might be invoked as to such activities.

Of importance also is the fact that in the *Morris* case the carrier did not transport freight across State lines.

(See footnote 7, *id.* p. 87.) The carrier's interstate transportation (4% of the total) was "freight directly in interstate commerce, either as part of continuous movements or of interstate movements begun or terminated in metropolitan Detroit." (*id.*) In footnote 7 (*id.*) these movements in metropolitan Detroit are described as being:

"Wholly within the boundaries of the State of Michigan," and the carrier's work as "involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation between the defendant and such other interstate carriers."

The last quoted language aptly fits appellant's interstate activities, found by the Court to constitute $44\frac{2}{3}\%$ of its total business. [Finding IV, R. 14-15.]

There is little point and no merit whatever in appellees' contention that they were not full time drivers in interstate commerce, the implication being that because of that fact the *Morris* case is not applicable. The decisive point is, that under that decision an employee who spends 4% of his time in driving a motor truck in the transportation of goods in interstate commerce is exempt from the provisions of the Fair Labor Standards Act. And what is true of a driver is equally true of the other classes of employees mentioned and set forth, *ante*.

A. Detailed Activities Showing That Appellees Engaged in Work Involving Safety of Operations in Interstate Commerce.

Appellees assert that appellant must have established that each appellee devoted a substantial part of his time to activities directly affecting safety of operations of motor vehicles in interstate transportation, and that appellant has failed to sustain that burden. (Appellees' Br. pp. 16-20.) Appellees' own statement of those activities (Br. p. 17) is too sketchy and incomplete to be of any value to the Court.

In its opening brief (pp. 24-28) appellant set forth detailed activities of appellees sufficient, we believe, to show conclusively that they were engaged in safety of operations in interstate commerce. If that statement seems somewhat incomplete, it must be remembered that, because of the destruction of many of its records by a fire and a change of management, appellant was at a disadvantage through no fault of its own. It submitted to the best of its ability the records of each employee for the time involved in this action. At the risk of repetition, and in the hope that these interstate activities may be made to appear more plainly to the Court, the same are again set forth by groups, classified as Drivers and Helpers; Loaders and Unloaders; Packers and Unpackers, and Craters; Mechanics and their Helpers.

(1) DRIVERS AND DRIVERS' HELPERS.

The record shows the following appellees were drivers or drivers' helpers: Emory Key, [R. 84] 10% of time;

Earl Graham [R. 175-176] 3 days a week for 4 months; Joseph Sevedra [R. 188] 9 months; George W. Peterson [R. 189]; Louie Vaughn [R. 198, 202] full time 8 weeks, 10% to 15% of time thereafter; Leon T. McRossen [R. 204, 209] 10% to 15% of time; Noble F. White [R. 216, 217] part of time, remainder loading and unloading; David Garcia [R. 218-220] all the time; Richard Magnus [R. 230] 15% of time; Sidney H. Smith [R. 269] for 4 months, then trucking (driving) to Long Beach. Of the 18 appellees, 10 are thus shown to have been drivers. In addition, some of the 10 performed duties of loaders or unloaders.

(2) LOADERS AND UNLOADERS.

The following appellees were loaders or unloaders, or both: Bert Armstrong [R. 78] on railroad cars, all in interstate commerce; Emory Key [R. 84, 86] 20% of time; Earl Graham [R. 175, 176] percentage of time not shown; Louis Kanier [R. 181] did some unloading; Thomas P. Remus [R. 183] some unloading, all interstate; Leon T. McRossen [R. 209] 5% to 10% of time; Ira C. Holder [R. 214] 20% loading and unloading; Noble F. White [R. 217], combination driver helper, loader and unloader; Richard Magnus [R. 230] 5% of time; King Fisher [R. 267] packer, mover, handler all of the time. Thus 10 of the 18 appellees engaged in loading and unloading. Some of these 10 also were drivers and drivers' helpers.

(3) MECHANICS AND THEIR HELPERS.

One appellee, Harold N. Wheeler [R. 223, 225, 226], was a mechanic, and a helper, and prior thereto, oiled and greased trucks.

(4) PACKERS AND UNPACKERS.

Several of the appellees who were drivers, helpers, loaders, or unloaders, also performed part time duties as packers and unpackers, hence their names are not repeated here as packers or unpackers. Only L. A. Charette [R. 236, 237] was a full time packer. We believe that a packer's duties affect safety of operations, although thus far the courts do not appear to have decided that question. But, if it be assumed that their duties do not involve safety of operations, then only one of the 18 appellees is shown by the foregoing detailed statement not to have been so engaged.

There can be no doubt that drivers, drivers' helpers, loaders, unloaders, mechanics, and mechanics' helpers, including oilers and greasers of trucks, come within the exemption of 29 U. S. C. A., Section 213(b)(1) and 49 U. S. C. A., Section 304(a). The Interstate Commerce Commission has so held and the Supreme Court has sustained the Commission. (See authorities cited in Op. Br. pp. 19-22.)

It is immaterial that some of the appellees performed duties involving safety of operations in interstate commerce only a part of their time. That was true of all of the employees involved in *Morris v. McComb*, 92 L. Ed. (Adv. Op.) 85, *supra*; such employees devoting only 4% of their total activities to safety of operations in interstate commerce. None of the appellees, save only L. A. Charette (the full time packer), failed to devote more than 5% of his time to activities involving safety of operations in interstate commerce. Most of them devoted from 10% to full time in such operations. Thus, on the facts the case at bar presents a stronger showing than was made in *Morris v. McComb*, *supra*.

In this connection, the evidence of Maynard Diegel, appellant's assistant secretary and manager, as detailed in the opening brief, at pages 26-28, is important as showing the distribution of driving activities of drivers in certain selected weekly periods illustrative of the whole thereof.

As in the *Morris v. McComb* case, *supra*, each and all of the appellees engaged indiscriminately in the performance of their classified duties and activities in safety of operations. The very fact that most of them performed duties in more than one class of activities is evidence of the indiscriminate nature of their work. This, too, clearly appears from the evidence of Mr. Diegel above referred to. Appellant's working force of men was too small to be otherwise.

Moreover, when it is noted that 44 $\frac{2}{3}$ % of appellant's business was interstate, it is reasonable to deduce that each of the appellees was engaged in activities a substantial part of his time involving safety of operations in such commerce.

In view of the foregoing facts, it is submitted that appellant has sustained any burden of proof imposed upon it by law.

For the reasons set forth in our opening brief and in this reply brief, we respectfully submit that the judgment of the trial court should be reversed.

Respectfully submitted,

JOHN W. PRESTON and
PRENTISS MOORE,

By JOHN W. PRESTON,
Attorneys for Appellant.

No. 11635

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC., a California corporation,

Appellant,

vs.

BERT ARMSTRONG, *et al.*,

Appellees.

PETITION FOR REHEARING.

JOHN W. PRESTON,

PRENTISS MOORE,

458 South Spring Street, Los Angeles 13,

Attorneys for Appellant.

FILED
MAY 25 1948

TOPICAL INDEX

PAGE

I.

This action is barred under both Section 9 and Section 11 of the Portal-to-Portal Act	2
---	---

II.

The judgment in this case is not a joint one but is a several and separate judgment for each of the successful plaintiffs....	4
---	---

III.

Many of the plaintiffs are certainly affected by the Motor Carriers' Act (49 U. S. C. A., Sec. 304) and Section 13b of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213).....	5
---	---

IV.

The Court erroneously concluded that appellant was not a retail service establishment within the meaning of Section 13(a)(2) of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213(a)(2)	10
--	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Lesser v. Sertner's, Inc., 166 F. (2d) 471.....	13
Morris v. McComb, 92 L. Ed. 83.....	5, 7, 8, 9
Roland v. Walling, 326 U. S. 657.....	13
Southern Gasoline v. Bayley, 319 U. S. 44, 63 S. Ct. 917.....	8
Virgil v. Cayuga Const. Corp., 55 N. Y. S. (2d) 94, affd. 269 App. Div. 934	4

STATUTES	
Fair Labor Standards Act, Sec. 16 (29 U. S. C. A., Sec. 216) ..	4
Portal-to-Portal Act, Sec. 9.....	2, 3, 4
Portal-to-Portal Act, Sec. 11.....	3
United States Code Annotated, Title 29, Sec. 213(b)	5, 7, 9
United States Code Annotated, Title 29 (Supp.), Sec. 258.....	3
United States Code Annotated, Title 29 (Supp.), Sec. 260.....	2
United States Code Annotated, Title 49, Sec. 304	5, 6, 7, 9

No. 11635

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC., a California corporation,

Appellant,

vs.

BERT ARMSTRONG, *et al.*,

Appellees.

PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit and the Judges Thereof:*

Comes now Coast Van Lines, Inc., the appellant in the above-entitled cause, and presents this, its petition for a rehearing of said cause, and in support thereof respectfully shows:

Appellant feels most strongly that the Court has overlooked some compelling facts which require a reconsideration of the conclusion announced in this case.

I.

This Action Is Barred Under Both Section 9 and Section 11 of the Portal-to-Portal Act.

At the outset, it must be noted that this action was begun and tried before the Portal to Portal law was enacted. The amended complaint was filed March 23, 1946. [R. 6.] The judgment was entered December 3, 1946 [R. 28]; the Portal to Portal Act was approved May 14, 1947. (29 U. S. C. A. (Supp.) 260.)

Section 9 of the Portal to Portal Act provides as follows:

“RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.,—

“In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval,

interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” (29 U. S. C. A. (Supp.) Section 258.)

This statute is thus made applicable to the present cause. This Court has denied appellant the benefit of this section, using the following language:

“Appellant failed to plead good faith as a defense; we are therefore unable to consider it.”

Inasmuch as the statute was passed and became a law while this case was on appeal, it was manifestly impossible for appellant to plead and prove good faith when no such requirement or defense was in existence. Moreover, the construction thus placed by the Court upon the Act will, if not modified, serve in many cases, as here, to make wholly ineffective the following provisions of Section 9 relating to actions brought *before* passage of the Act, to wit:

“In any action or proceeding commenced *prior* to . . . this Act, no employer shall be subject to any liability or punishment for . . . failure . . . to pay minimum wages . . . if he pleads and proves that the act or omission complained of was in good faith,” etc.

Since the Court has remanded the case to give appellant the benefit of the provisions of Section 11 of the Act, why should not appellant also have the same opportunity to defend under Section 9? Surely this must be what the Congress intended.

A sufficient showing of good faith was made by affidavit filed in this cause in this Court at the time of the oral argument. This is all that appellant could possibly do to defend under the provisions of Section 9. To deny appellant this opportunity is to deny it a right given by Section 9, which, on its face, applies to any action or proceeding commenced *prior to* or on or after the 14th day of May, 1947.

Appellant therefore respectfully urges that the order of remand in this case be modified to give a plenary new hearing and not merely a restricted one.

II.

The Judgment in This Case Is Not a Joint One but Is a Several and Separate Judgment for Each of the Successful Plaintiffs.

While the statute permits the cause of action of one plaintiff to be joined with a similar cause of action by another, nevertheless, it is the duty of the Court to weigh each cause of action separately and on its own facts. It is altogether probable that one could prevail and another fail. Section 16 of the Fair Labor Standards Act (29 U. S. C. A., Sec. 216) compels such treatment of the plaintiffs in this case and gives defendant the right to separate consideration of each claim. (See also *Virgil v. Cayuga Const. Corp.*, 55 N. Y. S. (2d) 94, affirmed 269 App. Div. 934.)

III.

Many of the Plaintiffs Are Certainly Affected by the Motor Carriers' Act (49 U. S. C. A., Sec. 304) and Section 13b of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213).

We shall now consider the claims of many of the successful plaintiffs separately. Several of them engaged in work of such character that it cannot be doubted that a substantial portion thereof—far more than the 4%, held sufficient in *Morris v. McComb*, 92 L. Ed. 83—affected safety of operations and equipment within the meaning of the exemption claimed under 29 U. S. C. A., Section 213(b), and 49 U. S. C. A., Section 304.

We take, first, the case of David Garcia. [R. 218-220.] This plaintiff did nothing except drive a truck in transporting goods for Navy personnel principally, if not wholly, in interstate commerce. Those goods were shipped from out-of-state points to San Pedro for delivery to consignees and were transported by appellant to the homes of consignees to various points in California. The entire movement was continuously in interstate commerce. This plaintiff has been awarded a judgment in this case for \$410.32. [R. 27.] Upon no theory can appellant be liable to him for one cent, since his employment for about seventy-three weeks consisted entirely of driving a truck in interstate commerce. Not only has he received a judgment against appellant for said sum, but the judgment for attorney's fees herein is based in part upon his recovery.

Plaintiff, George W. Peterson, has been given judgment against appellant for \$303.88 [R. 20] for overtime of 313½ hours during a period of 57 weeks. [R. 25.] This plaintiff hired as packer, but was a driver. He testified that the goods hauled in the truck driven by him were "all for interstate" movements [R. 190] for Navy personnel. Thus, by his own testimony, without more, this plaintiff was engaged solely in driving trucks transporting goods in interstate commerce. Appellant is not, and cannot be, liable to him for one penny.

Plaintiff, Joseph Sevedra [R. 185], was a driver's helper for nine months. [R. 186, 188.] The goods handled by him were mostly those of Navy personnel [R. 186] and the record shows that most of said goods moved in interstate commerce. This plaintiff was given a judgment against appellant for \$304.00 for overtime during a period of 55 weeks during the 1944-1945 period. It is unreasonable to say that this man was not engaged for a substantial part of his time in work affecting safety of operations and equipment under the Motor Carrier Act (49 U. S. C. A., Sec. 304). Therefore, appellant does not owe this plaintiff a cent.

Plaintiff, Louie Vaughn [R. 198-202], was given judgment for overtime for 957 hours [R. 22, 26] during a period of 174 weeks, in the amount of \$951.78. [R. 28.] The record plainly shows that he was a full-time driver for 8 weeks, and thereafter was a driver from 10% to 15% of his time. He testified that about 19 out of 20 jobs were for Navy personnel [R. 200], and the record shows that the goods of such personnel moved principally in interstate commerce. The conclusion is inescapable that he was performing work involving safety of operations and equipment in the transportation of goods in

interstate commerce which, in percentage of his time, greatly exceeded the 4% held sufficient in *Morris v. McComb*, 92 L. Ed. 85, *supra*.

The plaintiff, Earl Graham, was given judgment for \$322.04 [R. 28] for overtime of 5½ hours per week for 64 weeks. He drove "some of the time" [R. 175], and for three days a week for three months [R. 175] to and from Long Beach, hauling and handling goods of Navy personnel shipped to Great Lakes Naval Station, Washington, D. C., New York, South Carolina, Virginia, "in almost every state of the Union." [R. 177.] He says almost "100 per cent" of these goods were thus shipped [R. 177] out of Long Beach. This man, under his own testimony, is not entitled to a judgment against appellant.

Plaintiff, Sidney A. Smith, was hired as a packer, but was also a driver for about a year. [R. 269.] He testified that his driving was "that flat truck on the Navy (personnel) hauling from Long Beach, going from here to Long Beach all the time—hauling Navy freight." [R. 269.] By "Navy freight" he meant goods of Navy personnel, as the record shows that appellant handled no goods of the Navy itself. The year of driving mentioned is included in the total period covered by the judgment for overtime. This plaintiff is exempted, at least for the period of one year, from the Wage and Hour provisions of the Fair Labor Standards Act by reason of the provisions of 29 U. S. C. A., Section 213(b), and 49 U. S. C. A., Section 304, hence, not entitled to a judgment for said period.

Without detailing the activities of other drivers and helpers we have clearly shown in the briefs on file (Op. Br. 24-25; Rep. Br. 17-18) that: Emory Key was a

driver or driver's helper 10% of his time [R. 84]; Leon J. McRossen, 10% to 15% of his time [R. 204, 209]; Noble F. White, 15% of his time [R. 216, 217]; and Richard Magnus, 15% of his time [R. 230].

The facts shown respecting the work of the several plaintiffs who were drivers or driver's helpers, *supra*, when coupled with the finding of the trial court that 44 $\frac{2}{3}$ % of the entire business of appellant during the time involved herein was interstate, are sufficient, we submit, to show beyond reasonable doubt that each and every one of these drivers and driver's helpers was engaged in work involving safety of operations and equipment. We respectfully ask, how could it be possible, under this showing, to hold that none of these plaintiffs was engaged in work involving safety of operations and equipment, which is within the jurisdiction of the Interstate Commerce Commission, in view of the decision in *Morris v. McComb*, *supra*, where 4% is held to be substantial, and therefore sufficient to exempt them from the wage and hour provisions of the Fair Labor Standards Act?

The same argument applies, of course, to the plaintiffs who were loaders. Loading goods for transportation by truck in interstate commerce has been held to involve safety of operations and equipment. The Interstate Commission has so ruled, and its ruling has been fully sustained by the Courts. (See authorities cited in our Op. Br. pp. 19-23, including *Southern Gasoline v. Bayley*, 319 U. S. 44, 63 S. Ct. 917.) We urge for consideration by the Court the fact that 44 $\frac{2}{3}$ % of appellant's business

was in interstate commerce; that all drivers, driver's helpers and loaders handled and serviced the goods indiscriminately; and that it would be virtually impossible for any of these plaintiffs not to have been engaged in work involving safety of operations, both in time and activities, far in excess of the 4% held sufficient in *Morris v. McComb*.

Moreover, in its opinion this Court has made a holding, or finding, which fully supports our argument that the drivers, drivers' helpers and loaders above mentioned or referred to were engaged in work necessarily involving safety of operations within the meaning of the Motor Carrier Act (49 U. S. C. A., Section 304) and the Fair Labor Standards Act (29 U. S. C. A., Section 213(b)). This Court said, at page 2 of the opinion:

“During the period in question approximately one-half of appellant's business consisted of the transportation of goods belonging to Navy personnel in accordance with a contract negotiated with the Navy Department.”

We submit that, since “approximately one-half of appellant's business consisted of the transportation of goods belonging to Navy personnel,” and since these goods moved mostly in the stream of interstate commerce, as shown by every witness in the case who testified in respect thereto; and since the trial court so found, safety of operations was necessarily involved. It would be impossible for it to be otherwise.

It must, therefore, be concluded that the judgment should be reversed as to the above named plaintiffs.

IV.

The Court Erroneously Concluded That Appellant Was Not a Retail Service Establishment Within the Meaning of Section 13(a)(2) of the Fair Labor Standards Act (29 U. S. C. A., Sec. 213 (a)(2)).

We earnestly insist that this Court has reached an erroneous conclusion in reference to the exemption claimed by appellant, that it is a retail service establishment the greater part of whose servicing was in intrastate commerce.

The Court appears to base this conclusion upon two assumptions, to wit: (1) That approximately 50% of appellant's servicing was wholesale, because done for Navy personnel under the so-called Navy contract; and (2) that appellant made a lower price or charge for such servicing than it made to individuals. Neither of these assumptions is correct, as we understand the facts shown by the record.

First, the 50% of appellant's servicing which is assumed to be wholesale, because performed under a contract with the Navy Department, was not in any sense wholesale. *This servicing was done for individuals, and upon the goods of individuals.* The Navy Department never had title to any of these goods, it was not in any sense a consumer of these goods and it had no property or monetary interest therein.

At most, the Navy Department acted merely as a fiscal agent for Navy personnel in making a contract for their benefit and in paying for the servicing done thereunder for the exclusive benefit of such personnel. All arrangements and contacts with respect to the goods serviced

were made with Navy personnel, or with members of their families, *and not with the Navy Department*. None of the servicing done under the contract involved goods or property of the Navy, or goods or property in which the Navy had any right, title or interest. The servicing thus done for Navy personnel, and upon property of Navy personnel, was as truly individual in character as if it had been done for John Jones and Bill Smith, individual members of the non-military public. Can it matter, in the slightest degree, that Navy personnel were represented by an agent in negotiating a contract for their sole benefit? We submit it is immaterial.

The ruling of the Wage and Hour Administrator that at least 75% of servicing shall be retail in character to entitle an establishment to the service exemption is not applicable under the facts of this case. Nor would it be controlling in law even if it were applicable. The Courts have not hesitated to declare such rulings beyond his power where they conflict with the intent and purpose of Congress, or where unreasonable, or arbitrary. In any event, the Administrator's ruling has no application to this case, since only individuals' goods were involved in appellant's servicing.

Second, the Court is in error in concluding that "The price paid was not the ordinary 'retail' price, but a special price based in reality upon the wholesale aspect of the business." We respectfully say that there is no factual support for this conclusion.

It is true that appellees state in their brief (page 11) that "These fees and prices were *different* from those charged to the individual customer." But appellees do not cite any part of the record to support the statement, nor could they do so. It is pure inference. We have

examined the record again and find nothing to justify appellees' quoted statement. The only portion of the record that even indirectly relates to this matter is found at pages 167-168, as follows:

"Q. By Mr. Moore: Mr. Cummins, I ask you to examine the Defendant's Exhibit E, particularly of those portions concerning the tariffs involved, and ask you if those tariffs compare favorably with the tariffs charged for individuals for similar types of work?

"Mr. Beardsley: That is objected to as not within the issues of the case and immaterial; and also, calling for a conclusion of the witness based upon matters not in evidence, what the tariffs are to the individuals, and not the best evidence of those tariffs.

"The Court: What is the point, Mr. Moore, so I will be sure that I know?

"Mr. Moore: Well, your Honor, I think it was raised by plaintiffs that, regardless of what work was done for the individual, whether it be for the Government or otherwise, that it constituted the bulk of lower priced rate, and that they felt that had some bearing on whether or not it was a service establishment or a service institution, by the price that was charged.

"Mr. Beardsley: I have no such contention that the rates or prices charged had any bearing on that. I do not think I have made it.

"The Court: I do not think it has any bearing at all and, on the statement of counsel now, I do not believe it is material.

"Mr. Moore: That is the only purpose for which the question was asked and I will withdraw the question."

No inference can reasonably be drawn from this colloquy between Court and counsel that a lower, or even "a different," price was charged Navy personnel than was charged other individual members of the public. On the contrary, since the question giving rise to the colloquy was withdrawn the record is utterly silent on the point, and no inference at all can be drawn therefrom.

In connection with the service exemption claimed, the Court has cited *Lesser v. Sertner's, Inc.*, 166 F. (2d) 471, decided by the Circuit Court of Appeals for the Second Circuit, February 18, 1948. The Court there said, at page 473:

"As we read the authorities, the test of whether the local merchant or purveyor of service is operating a retail establishment is the type of customers he has; *the volume of his business, the number of his employees or the manner in which trade is attracted and customers obtained is not material. If the customers are 'ultimate consumers' of the goods sold or serviced locally, the establishment is retail.*"

The Court thus makes the ultimate test of whether an establishment is retail, in the sense of the statute, depend upon "the type of customers," and "if the customers are 'ultimate consumers' . . . the establishment is retail." The Court then cited *Roland v. Walling*, 326 U. S. 657, 666, and commented as follows:

" . . . the purpose of the exemption was to make plain that when a local merchant sells to customers for their own consumption . . . the Act is not to be applied."

Can it be said that the Navy Department was the "consumer" of any of the goods serviced under the so-called

Navy contract? Certainly not. The “consumers” of those goods were their individual owners, that is, Navy personnel. The Navy Department had not the slightest interest therein. The Navy Department had nothing to be “serviced” under the contract.

We believe that, for the foregoing reasons, the Court has reached erroneous conclusions in respect to matters vital to a correct decision in this case, and that in the interest of justice a rehearing should be granted.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted,

JOHN W. PRESTON,

PRENTISS MOORE,

Attorneys for Petitioner.

Certificate of Counsel.

I, John W. Preston, counsel for Petitioner, hereby certify that the above-entitled Petition for Rehearing is filed in good faith, that I believe the grounds thereof to be meritorious, and not for the purpose of delay.

JOHN W. PRESTON.

No. 11635

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE
GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KAN-
IR, EMERY KEY, RICHARD MAGNUS, LEON T. MC-
CROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS,
JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN,
NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS
WOLF,

Appellees.

REPLY TO PETITION FOR REHEARING.

CHARLES E. BEARDSLEY,
601 Rowan Building, Los Angeles 13,

HERBERT V. WALKER and
PERRY BERTRAM,

744 Chamber of Commerce Building, Los Angeles 15,
Attorneys for Appellees.

TOPICAL INDEX

PAGE

I.

The decision of this court is not affected by the April, 1948, interpretation of the Administrator of the Wage-Hour and Public Contracts Divisions concerning the scope of the motor carrier exemption of the Fair Labor Standards Act.....	2
---	---

II.

The appellant has failed to show that the appellees spent any substantial portion of their time in activities affecting safety of operations in interstate transportation.....	5
--	---

TABLE OF AUTHORITIES CITED

CASES	PAGE
A. H. Phillips, Inc. v. Walling, 324 U. S. 490.....	10
Consolidated Timber Co. v. Womack, 132 F. (2d) 101.....	10
Levinson v. Spector Motor Service, 91 L. Ed. 846.....	4, 5
Morris v. McComb, 92 L. Ed. 83.....	4, 5, 8
Pyramid Motor Freight Corp. v. Ispass, 91 L. Ed. 869.....	4

MISCELLANEOUS

Bulletin (April 1948) of the Administrator of the Wage-Hour and Public Contracts Division, U. S. Dept. of Labor, Sec. 782.5, pp. 15-17.....	6
---	---

STATUTES

Code of Federal Regulations, Title 29, Chap. V, Part 782 (Fed. Register, April 30, 1948).....	2
Portal Act, Sec. 9.....	4
Portal Act, Sec. 10.....	4
Portal Act, Sec. 11.....	4

No. 11635

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

COAST VAN LINES, INC.,

Appellant,

vs.

BERT ARMSTRONG, L. A. CHARETTE, KING FISHER, DAVE
GARCIA, EARL GRAHAM, IRA C. HOLDER, LOUIS KAN-
IR, EMERY KEY, RICHARD MAGNUS, LEON T. MC-
CROSSEN, GEORGE W. PETERSON, THOMAS P. REMUS,
JOE P. SEVEDRA, SIDNEY H. SMITH, LOUIE VAUGHN,
NOBLE F. WHITE, HAROLD N. WHEELER and MORRIS
WOLF,

Appellees.

REPLY TO PETITION FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit, and the Judges Thereof:*

By order of this court filed June 1, 1948, the appellees
have been directed to limit their answer to appellant's
Petition for Rehearing to two questions.

I.

The Decision of This Court Is Not Affected by the April, 1948, Interpretation of the Administrator of the Wage-Hour and Public Contracts Divisions Concerning the Scope of the Motor Carrier Exemption of the Fair Labor Standards Act.

In April, 1948, the Administrator of the Wage-Hour and Public Contracts Divisions, United States Department of Labor, issued a "General Statement as to the Exemption from Maximum Hours Provisions of the Fair Labor Standards Act for Certain Employees of Motor Carriers."¹ The bulletin begins with the following introduction explanatory of its purpose (footnotes omitted):

"SECTION 782.0. INTRODUCTORY STATEMENT.

"(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator as to the scope and applicability of the exemption provided by Section 13(b)(1) of the Act have been expressed in interpretations issued from time to time in various forms. These interpretations were always issued with the understanding that they were only advisory, so far as the rights and liabilities of employers and employees were concerned, because the courts alone had the authority to make legally binding interpretations. However, the Portal-to-Portal Act of 1947 contemplates that interpretations of the Administrator will now, under certain circumstances, be controlling in determining such rights and liabilities in the courts. This, together with recent decisions of the United States Supreme

¹Title 29, Chapter V, Code of Federal Regulations, Part 782, published in the Federal Register April 30, 1948.

Court concerning this exemption, has made it necessary, for the protection of employees and employers who may seek to rely on the Administrator's interpretation, that interpretations previously issued concerning the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, be re-examined in order to determine whether they now correctly interpret the law in the light of developments subsequent to their issuance, and that the Administrator's position be clarified for the future. This bulletin, as of the date of its publication in the Federal Register, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretation of the Administrator which will provide 'a practical guide to employers and employees as to how the office representing the public interest in enforcement of the law will seek to apply it.' The interpretations contained in this bulletin indicate, with respect to the scope and applicability of the exemption provided by section 13(b)(1) of the Fair Labor Standards Act, the construction of the law which the Administrator believes to be correct in the light of the decisions of the courts and of the Interstate Commerce Commission, and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon re-examination of an interpretation, that it is incorrect."

From this explanatory statement, two things are at once apparent. First, insofar as the interpretations contained in the bulletin may be binding upon the rights and obligations between employers and employees, their effect is prospective in operation. Indeed, no other such

effect is possible under the specific language of Sections 9, 10 and 11 of the Portal Act. At all events we do not understand appellant's contention to be that anything expressed in this bulletin relieves it of liability because of reliance thereon, pursuant to either Sections 9 or 11 of that Act.

Second, and of immediate pertinence to the question under discussion, the bulletin simply expresses the interpretations which *will guide the Administrator in the future* in the performance of his duty to enforce the Fair Labor Standards Act. It does not purport to define the degree of proof which the employer must present in order to bring his employees within the exemption. Nor does it, of course, in any way purport to broaden the scope of such recent court decisions as *Morris v. McComb* (1947), 92 L. Ed. 83, *Levinson v. Spector Motor Service* (1947), 91 L. Ed. 846, or *Pyramid Motor Freight Corp. v. Ispass* (1947), 91 L. Ed. 869, as to the applicability of the exemption.

So, therefore, when the Administrator states that he will for enforcement purposes consider employees in certain categories "who either regularly or from time to time are called upon to perform any operation affecting safety of transportation in interstate commerce" to be within the exemption that language is not intended, nor can it be construed, to disregard the plain statement of the Supreme Court in the *Morris* case that in an action to recover overtime compensation for individual employees, it is necessary to determine the extent to which such employees actually engage in that type of work.

The applicability of the court decisions, including the three Supreme Court decisions above cited, was fully discussed in the briefs of the parties, and was orally argued

in detail before this court. Since the court's decision herein is based upon a full consideration of the principles enunciated in those cases, and the Administrator has simply repeated those principles in indicating how he will be guided in enforcing the Act, nothing contained in the bulletin warrants a rehearing herein.

II.

The Appellant Has Failed to Show That the Appellees Spent Any Substantial Portion of Their Time in Activities Affecting Safety of Operations in Interstate Transportation.

As pointed out above, and in Appellees' Reply Brief, the Supreme Court, in *Morris v. McComb*, has clearly stated that in an action by individual employees to recover unpaid overtime the extent of the activities affecting interstate transportation engaged in by each employee would have to be determined. Not only must the extent of such activities be shown, but it must be further established that each of the appellees devoted a substantial part of his time thereto. *Levinson v. Spector Motor Service* (1947), 91 L. Ed. 846. But that is precisely what the appellant has failed to do.

First, it cannot be determined from the record what portion, if any, of the driving time was driving in interstate transportation. Much of the driving of the appellees was as "packers" in which all that they transported were packing materials. Thus, for example, Vaughn, described by appellant on page 6 of its Petition as a "driver," testified [R. 199] that he had a small packing truck on which he would carry the empty boxes and barrels, and that the larger truck would come around later and pick up the packed goods. This was not trans-

portation in interstate commerce. (In Vaughn's case the eight weeks mentioned by appellant in which he testified he served as a full-time driver was prior to the time for which any recovery was allowed him. [R. 26, 198-199.])

Second, all of the appellees mentioned on pages 6 and 7 of the Petition were packers for the most or some part of their employment. If any inference can be drawn from the record that at some other time they were employees whose activities affected safety of operations in interstate transportation, it is impossible to determine during what periods, if any, they were so engaged.

Third, there is nothing in the record to show what kind of activity any of the appellees was engaged in, so that it may be determined whether or not it affected safety of operations. Let us take the matter of loading, for example. The record does not show what sort of loading activity any of them engaged in. As stated in the bulletin of April, 1948, first quoted from above (quoting portions of Section 782.5, pages 15-17, inclusive, foot-notes omitted) :

“(a) A ‘loader,’ as defined by the Interstate Commerce Commission is an employee of a carrier subject to section 204 of the Motor Carrier Act . . . whose duties include, among other things, the proper loading of his employer's motor vehicles so that they may be safely operated on the highways of the country . . . but he engages as a ‘loader’ in work directly affecting ‘safety of operation’ so long as he has responsibility, when such motor vehicles are being loaded, for exercising judgment and discretion in planning and building a balanced load or in placing, distributing, or securing the pieces of freight in such

a manner that the safe operation of the vehicles on the highways in interstate or foreign commerce will not be jeopardized.”

.

“(c) An employee is not exempt as a loader where his activities in connection with the loading of motor vehicles are confined to classes of work other than the kind of loading described above, which the Commission has determined directly affects ‘safety of operation.’ The mere handling of freight at a terminal, before or after loading, or even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual, or occasional a part of an employee’s activities, or his activities may relate only to such articles or to such limited handling of them, that his activities will not come within the kind of ‘loading’ which is described by the Commission and which, in its opinion, directly affects ‘safety of operation.’”

The bulletin goes on with a discussion of various types of loading not affecting safety of operation, including the class of freight which, because it is light in weight, probably could not be loaded in a manner which would adversely affect safety of operations, and says (p. 17):

“It seems apparent from the foregoing discussion that an employee who has no responsibility for the proper loading of a motor vehicle is not within the exemption as a ‘loader’ merely because he furnishes physical assistance when necessary in loading heavy pieces of freight, or because he deposits pieces of freight in the vehicle for someone else to distribute and secure in place, or even because he does the physical work of arranging pieces of freight in the vehicle where another employee tells him exactly what

to do in each instance and he is given no share in the exercise of discretion as to the manner in which the loading is done.”

In the case at bar, the record discloses no proof as to the nature or extent of appellees’ duties which would bring them within the “safety of operation” definition. A mere showing that those who were essentially packers occasionally brought a box or two in to the warehouse, or helped place articles on trucks, does not meet the test in the language quoted.

In this state of the record, has appellant met its burden of proof, merely because an inference can be drawn that *some* of the appellees mentioned in the Petition² for *some* portion or period of their employment *may* have been called upon to perform duties affecting safety of operations? Are such employees to be denied their just compensation for the entire remainder of their employment on such an inference, because the state of the record does not enable a finding to be made as to when, if at all, they were in such occupations? Compare the record here with the detailed and elaborate proof before the court in *Morris v. McComb* which conclusively established that each full-time driver either did or might be called upon to perform, during the entire period of his employment, driving in interstate transportation.

Furthermore, we believe it to be abundantly clear that no inference whatsoever of any aid or comfort to the ap-

²Appellant apparently concedes that under no theory could Armstrong, Charette, Fisher, Holder, Kanir, Remus, Wheeler, or Wolf, not mentioned in Section III of its Petition, be deemed within the exemption.

pellant can be drawn from testimony of some of the appellees giving percentage estimates as to their driving time. As pointed out, we do not know during what period of employment such driving was performed, nor have we any way of knowing whether or not it was driving in interstate transportation.

The situation with which we are confronted is well illustrated in the testimony of Richard Magnus [R. 226-236] and the trial court's comment thereon. The trial court had previously indicated that the estimates of percentages had thus far not been too helpful, but in view of the defendant's theory he was permitting it to be thoroughly explored. [R. 208.] Finally, after extensive examination of Mr. Magnus directed to determining when, if ever, he actually hauled the packed materials for interstate transportation, as distinguished from the empty containers, the court stated [R. 236] that the witness "is not telling you he knows what [the percentage] is. He is just guessing. I consider that practically none of the cross-examination has helped the court a bit. The man says, 'I don't know; I am guessing.' The court knows he doesn't know unless he has a record. He is guessing at it for you. If you want him to guess that is all right but it does not mean anything to the court."

Submitting the record to the acid test, the appellees contend that there is nothing therein which would support a specific finding that any of the appellees was within the exemption for the entire or any designated portion of his employment. To the contrary, the evidence is conclusive that all of the appellees are entitled to judgment for all or the most part of their employment. If the appellant was entitled to deny the benefits of the Fair

Labor Standards Act to any of its employees for any portion of their employment, it was its burden to establish by a preponderance of the evidence that the work was “plainly and unmistakably” within the exemption.

A. H. Phillips, Inc., v. Walling, 324 U. S. 490, 493;

Consolidated Timber Co. v. Womack (1942, C. C. A. 9), 132 F. (2d) 101.

Manifestly the appellant has not met this burden by the guesswork and speculation which it must rely upon to establish its defense.

The appellees, therefore, respectfully pray that the Petition for Rehearing be denied.

Respectfully submitted,

CHARLES E. BEARDSLEY,
HERBERT V. WALKER and
PERRY BERTRAM,

Attorneys for Appellees.

72473

No. 11636
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

JOSEPH D. KOURY,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG - 1 1947

PAUL P. O'BRIEN,
CLERK

No. 11636

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

JOSEPH D. KOURY,
Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Answer to Complaint.....	6
Appeal:	
Notice of	17
Points on and Designation of Record, Appellant's (Circuit Court)	20
Certificate of Clerk.....	18
Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938.....	2
Findings of Fact and Conclusions of Law.....	10
Judgment	16
Minute Order Entered December 31, 1946.....	9
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	17
Points on Appeal and Designation of Record, Appel- lant's (Circuit Court).....	20

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

THELEN, MARRIN, JOHNSON & BRIDGES

SAMUEL S. GILL

ROBERT H. SANDERS

215 West Sixth Street

Los Angeles 14, Calif.

For Appellee:

WEINSTEIN, BERTRAM & VOGEL

1151 S. Broadway

Los Angeles 15, Calif. [1*]

2 *Joshua Hendy Corporation, a corporation, vs.*

In the District Court of the United States in and for the
Southern District of California

Central Division

No. 4747-RJ Civil

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORP., a corporation,
tion,

Defendant.

COMPLAINT FOR WAGES AND LIQUIDATED
DAMAGES DUE UNDER THE FAIR LABOR
STANDARDS ACT OF 1938.

Plaintiff complains and alleges:

I.

Plaintiff brings this action on behalf of himself and other employees similarly situated, pursuant to Sec. 16 (b) of the Fair Labor Standards Act of 1938 (Public No. 718, 75th Cong, CH. 676, 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219), hereinafter referred to as the Act to recover overtime wages, liquidated damages and attorney's fees.

II.

Jurisdiction of this action is conferred upon the Court by Sec. 16 (b) of the Act and by Sec. 24 (8) of the Judicial Code (28 U.S.C. Sec. 41 (8)).

III.

Defendant is a corporation organized under the laws of [2] the State of California, authorized to do business

therein and having its principal place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court.

IV.

At all times mentioned herein, defendant was and now is engaged at its said place of business in the County of Los Angeles, State of California, within the jurisdiction of this Court, in interstate commerce and in the production of goods, to-wit, ships, for interstate commerce within the meaning of the Act.

V.

From April, 1943, to and including July, 1944, defendant employed the plaintiff at its said place of business as an interpreter-recruiter, in which capacity plaintiff was employed by the defendant in interstate commerce, in the production of goods for interstate commerce, and in an occupation and in processes necessary to such production, all within the meaning of the Act.

VI.

For his services for the defendant as aforesaid, plaintiff received compensation from the defendant at hourly rates of pay of \$1.13 during a portion of his period of employment, and of \$1.20 during another portion of his period of employment, and during the remainder of his period of employment, received weekly compensation which paid for forty-eight hours worked per week. Said weekly compensation was the weekly equivalent of \$275.00 per month. At the present time defendant does not know the precise period of his employment in which he was employed at an hourly rate of \$1.13; in which he was employed at an hourly rate of \$1.20; and in which he received each week, for forty-eight hours worked, the weekly

equivalent of \$275.00 per month. The precise periods of employment at the respective rates of pay are contained in the records of plaintiff's employment by the defendant, which are in the possession of the defendant. [3]

VII.

In substantially every week during his employment by the defendant as aforesaid, plaintiff worked in excess of forty-eight hours. While he was employed at hourly rates, he received compensation at one and one-half the regular rate of pay at which he was employed for his hours worked in excess of forty, and up to and including forty-eight hours. While he was employed at a monthly rate of pay, he was paid at straight time only for all hours worked up to forty-eight. Neither while he was employed at hourly rates, nor while he was employed at a monthly rate, did he receive any compensation at all for his hours worked in excess of forty-eight.

VIII.

Plaintiff does not at the present time know the exact number of hours worked by him for the defendant during the period of his employment, as aforesaid, but said hours are known to the defendant and contained in the records of plaintiff's employment in the possession of the defendant.

IX.

There is now due, owing, and unpaid from the defendant to the plaintiff a sum equal to the product of one and one-half times his regular rate of pay and the hours

worked by him in excess of forty-eight during his entire period of employment, plus a sum equal to the product of one-half his regular rate of pay times the hours worked by him in excess of forty and to and including forty-eight while he was employed at a monthly rate of pay, plus an amount equal to said sums as liquidated damages.

X.

Sec. 16 (b) of the Act provided that the Court in this action shall, in addition to any judgment awarded to the plaintiff, allow a reasonable attorney's fee to be paid by the defendant.

Wherefore, plaintiff prays judgment against the defendant [4] for a sum equivalent to the product of one and one-half times his regular rate of pay and the hours worked by him in excess of forty-eight during his entire period of employment, plus a sum equal to the product of one-half his regular rate of pay times the hours worked by him in excess of forty and to and including forty-eight while he was employed at a monthly rate of pay, for a further amount equal to said sums as liquidated damages, for a reasonable attorney's fee, for his costs of suit incurred herein, and for all proper relief.

WEINSTEIN & BERTRAM

By Perry Bertram

Attorneys for Plaintiff [5]

[Verified.]

[Endorsed]: Filed Sep. 4, 1945. [6]

[Title of District Court and Cause]

ANSWER TO COMPLAINT

Now comes the defendant herein and answers the complaint of the plaintiff herein, as follows:

I.

Answering the allegations contained in paragraph IV of said complaint, said defendant alleges that at all times mentioned in said complaint defendant was and now is engaged at Terminal Island, County of Los Angeles, State of California, in the production of ships for the United States Maritime Commission under cost-plus contracts up to January 1, 1945, and under a selective price contract since said date.

Except as herein expressly admitted, defendant denies each and every allegation contained in said paragraph IV.

II.

Answering the allegations contained in paragraph V of said complaint, said defendant alleges that said plaintiff was employed by said defendant as a laborer from April 28, 1942, until [7] May 27, 1942; as a laborer leadman from May 27, 1942, until August 1, 1943; as an interviewer from August 1, 1943, until January 16, 1944, and as a Recruiting Officer from January 16, 1944, until July 30, 1944, which said occupations were necessary to the production of said ships.

Except as herein expressly admitted, defendant denies each and every allegation of said paragraph V.

III.

Answering the allegations of paragraphs VI, VII and VIII of said complaint, defendant alleges that plaintiff

received compensation from the defendant at hourly rates of pay of eighty cents (80¢) during the period from April 28, 1942, until May 27, 1942; of ninety-five cents (95¢) during the period from May 27, 1942, until September 8, 1942; of One Dollar and three cents (\$1.03) during the period from September 8, 1942, until September 19, 1943; of One Dollar and Thirteen Cents (\$1.13) from September 19, 1943, until January 16, 1944; and received a monthly salary of \$275.00 for the period from January 16, 1944, until July 30, 1944. That in order to receive said monthly salary, it was the understanding between plaintiff and defendant that plaintiff was to be employed for a minimum of forty-eight hours per week and so long thereafter as necessary to perform his work. That the staff attendance records of defendant show that plaintiff was in attendance for forty-eight hours for each workweek from the week ending August 7, 1943, until the week ending January 16, 1944. For each of said workweeks plaintiff was paid at the rate of one and one-half times his hourly rate for all hours which said records show plaintiff was in attendance for hours in excess of forty hours per week. That during the period from January 16, 1944, until July 30, 1944, while plaintiff was employed at a monthly salary the staff attendance records of defendant show that plaintiff was in attendance for forty-eight hours for each of the weeks during said period, with the exceptions of the weeks [8] ending June 4, 1944, and June 11, 1944; that for each of said weeks, except the two last-mentioned, said plaintiff received as compensation the sum of \$63.46, which was the weekly equivalent of the monthly salary of \$275.00.

Except as herein expressly admitted, said defendant denies each and every allegation contained in paragraphs VI, VII and VIII of said complaint.

IV.

Answering the allegations contained in paragraph IX of said complaint, defendant denies each and every allegation contained in said paragraph IX.

For A Further, Separate And First Affirmative Defense, said defendant alleges that said plaintiff during the period while he was employed in the classification of Recruiting Officer was employed in an administrative capacity within the meaning of Section 13(a) of the Fair Labor Standards Act and the Regulations of the Wage and Hour Administrator issued pursuant thereto.

For A Further, Separate And Second Affirmative Defense, said defendant alleges that in respect to all claims of the said plaintiff which accrued three years prior to September 4, 1945, such are barred by the provisions of Section 338 of the California Code of Civil Procedure.

Wherefore, said defendant prays that plaintiff take nothing by his complaint, and that defendant have judgment for its costs of suit herein.

THELEN, MARRIN, JOHNSON & BRIDGES

By Samuel S. Gill

SAMUEL S. GILL

Attorneys for Defendant [9]

Received copy of the within Answer this 25th day September, 1945. Perry Bertram (b. f.) Attorney for Plaintiff.

[Endorsed]: Filed Sep. 25, 1945. [10]

[Title of District Court and Cause]

MINUTE ORDER.

Judge Weinberger's Calendar, Dec. 31, 1946

It has been admitted by the pleadings and stipulations herein that plaintiff, during the period of his employment with defendant was employed in interstate commerce within the meaning of the Fair Labor Standards Act. Defendant has contended that plaintiff was employed in an Administrative capacity and therefore not subject to the provisions of said Act.

From the evidence it appears that plaintiff was not an administrative employee, and not in an exempt classification, and is entitled to overtime, liquidated damages and attorneys fees.

Counsel have stipulated concerning the amounts to which plaintiff is entitled for the period up to and including the work week ending January 15, 1944, and have further stipulated as to the number of hours over forty worked by plaintiff each week from January 15, 1944 until the termination of plaintiff's employment with defendant. [14]

Counsel have further stipulated that if plaintiff is not in an exempt classification, the court should adopt one of two theories concerning the amount due plaintiff per hour for such overtime work, and each counsel has prepared a computation regarding the amounts due under the theory which he contends is correct. It appears to us the computation prepared by plaintiff should be adopted.

Counsel for plaintiff will prepare findings and judgment in accordance with this order, and present the same within

10 days from date hereof, leaving a blank space for the amount of attorneys' fees.

Counsel for both parties will communicate with the Court's law clerk to arrange a date upon which the Court may consider evidence concerning what amount constitutes a reasonable attorneys fee to be awarded counsel for plaintiff herein.

Copies to counsel. [15]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the above entitled Court, Hon. Jacob Weinberger, Judge Presiding, on April 4, 5 and 9, 1946, the plaintiff being present in person and by his counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted,

The Court, being fully advised, makes the following

FINDINGS OF FACT.

1. This action was brought by the plaintiff to recover from the defendant unpaid overtime wages and liquidated damages as provided [16] by the Fair Labor Standards

Act of 1938 (Public No. 718, 75th Cong., Ch. 676. 52 Stat. 1060-1069 (1938), 29 U.S.C., Sec. 201-219) hereinafter referred to as the Act.

2. At all times mentioned in these Findings, Defendant was a corporation duly organized under the laws of the State of Delaware, authorized to do business in California, and having and operating a shipyard located at Wilmington, California, within the territorial jurisdiction of this Court, where it was engaged in producing ships. All of the ships produced by the Defendant were, upon their completion, delivered at said shipyard to the United States Maritime Commission, which thereafter transported, delivered or took said ships from the State of California to points outside the State of California.

3. From prior to the week ending April 10, 1943, until July 31, 1944, plaintiff was employed by the defendant at and about its said shipyard in Wilmington, California, in the capacity of labor recruiter, in which capacity plaintiff was employed by the defendant in the production of said ships and in processes and occupations necessary to said production of ships.

4. From the week ending April 10, 1943, to and including the week ending September 18, 1943, plaintiff was employed by defendant at an hourly rate of \$1.03, and received each week the sum of \$53.56, which paid for forty (40) hours at straight time and eight (8) hours at time and one-half. From the week ending September 25, 1943, to and including the week ending January 15, 1944, plaintiff was employed by the defendant at an hourly rate of \$1.13, and received each week the sum of \$58.76, which paid for forty (40) hours at straight time, plus eight (8) hours at time and one-half. During both of these pe-

12 *Joshua Hendy Corporation, a corporation, vs.*

riods he received no compensation for hours worked by him in excess of forty-eight (48) in a work week.

5. From the week ending January 22, 1944, to and including July 31, 1944, plaintiff was employed by defendant at a monthly salary of \$275.00 and received each week the weekly equivalent of that monthly [17] salary, or the sum of \$63.46, which paid for forty-eight (48) hours at straight time. During this period he received no additional half time for hours worked by him in excess of forty (40) in a week, and received no compensation for hours worked by him in excess of forty-eight (48) in a work week.

6. During the period mentioned in Finding 5, the monthly salary therein mentioned was paid with the understanding of both parties that it covered and compensated for forty-eight (48) hours of work per week, that if less than forty-eight hours should be worked in any week, the plaintiff's compensation would be reduced by one-forty-eighth ($1/48$) of his weekly pay for each hour under forty-eight that his hours of work totaled, and that if more than forty-eight hours should be worked in any week, no additional compensation would be paid for such excess hours over forty-eight. Accordingly, during this period, plaintiff's monthly salary reduced to an hourly rate was \$1.32 per hour.

7. The parties have stipulated to the number of overtime hours worked by plaintiff in each work week from June 5, 1943, to and including January 15, 1944, and the Court hereby finds, in accordance with that stipulation, that during said period plaintiff worked $178\frac{1}{4}$ overtime hours in excess of forty-eight (48) in a week.

8. The parties have stipulated that the amount of overtime compensation which should have been, but was not, paid during the period from the week ending June 5, 1943, to and including the week ending January 15, 1944, is the sum of \$295.85 and the Court so finds.

9. The parties have stipulated to the number of overtime hours worked by plaintiff in each work week from the week ending January 22, 1944, to and including July 31, 1944, and the Court finds, in accordance with that stipulation, that during said period plaintiff worked 511.25 hours in excess of forty (40) in a week, of which 303.25 hours were hours worked in excess of forty-eight (48) in a week.

10. The parties have stipulated that should the Court find [18] that plaintiff's monthly salary paid him for forty-eight (48) hours worked each week, the amount of overtime which should have been, but was not paid, during the period from the week ending January 22, 1944, to July 31, 1944, is the sum of \$736.75, and the Court so finds.

11. At no time during his employment by the defendant, did plaintiff regularly and directly assist an employee employed in a bona fide executive or administrative capacity (as such terms are defined in the Regulations of the Administrator of the Wage-Hour Division of the United States Department of Labor), where such assistance was nonmanual in nature or required the exercise of discretion or independent judgment.

At no time during his employment by the defendant, did plaintiff perform under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along spe-

cialized or technical lines requiring special training, experience, or knowledge, or which required the exercise of discretion and independent judgment.

At no time during his employment by the defendant, did plaintiff's work involve the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion or independent judgment.

12. Plaintiff has employed the firm of Weinstein & Bertram to prosecute this action on his behalf, and said firm has rendered legal services to the plaintiff herein, and the sum of \$400.00 is a reasonable amount to be allowed for such services.

From the foregoing Findings, the Court draws the following

CONCLUSIONS OF LAW.

1. Jurisdiction of this action is conferred upon the Court by the Act and by Section 24 (8) of the Judicial Code (28 U.S.C. §41(8)).

2. From April 10, 1943, to July 31, 1943, the period involved in this action, plaintiff was employed by the defendant in the [19] production of goods for interstate commerce and in processes and occupations necessary to such production within the meaning of the Act.

3. At no time while employed by the defendant was plaintiff employed in a bona fide administrative capacity, within the meaning of Section 13(a)(1) of the Act.

4. For the period from April 10, 1943, to January 15, 1944, while plaintiff was employed at hourly rates of

pay, plaintiff is entitled to recover of the defendant the sum of \$295.85, as and for unpaid overtime wages, plus an equal amount as liquidated damages.

5. For the period from January 16, 1944, to July 31, 1944, while plaintiff was employed at a monthly salary, plaintiff is entitled to recover of the defendant the sum of \$736.75, as and for unpaid overtime wages, plus an equal amount as liquidated damages.

6. Plaintiff is further entitled to recover of the defendant the sum of \$400.00, ~~payable directly to Weinstein & Bertram,~~ as *an* for attorneys' fees for legal services rendered to the plaintiff in the prosecution of this action.

7. Plaintiff is further entitled to recover of the defendant his costs of suit incurred herein.

JACOB WEINBERGER

Judge

January 22, 1947

The foregoing Findings of Fact and Conclusions of Law are approved as to form.

January 20, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES and
SAMUEL S. GILL and ROBERT H. SANDERS
by Robert H. Sanders [20]

Received copy of the within Findings this 20 day of Jan., 1947. Robert H. Sanders, Attorney for Defendant.

[Copy received.]

[Endorsed]: Filed Jan. 23, 1947. [21]

In the District Court of the United States in and for the
Southern District of California

Central Division

Civil Action File No. 4747-W

JOSEPH D. KOURY,

Plaintiff,

vs.

CALIFORNIA SHIPBUILDING CORPORATION, a
corporation,

Defendant.

JUDGMENT

This cause having come on regularly for trial before the above entitled Court, Hon. Jacob Weinberger, Judge Presiding, on April 4, 5 and 9, 1946, the plaintiff being present in person and by his counsel Perry Bertram of Weinstein & Bertram, and the defendant being represented by its counsel Samuel S. Gill and Robert H. Sanders, of Thelen, Marrin, Johnson & Bridges, Samuel S. Gill and Robert H. Sanders, and both parties having introduced evidence, both oral and documentary, having entered into various stipulations of facts, having submitted briefs, and having been fully heard, and the cause having been submitted.

The Court having made its Findings of Fact and drawn its Conclusions of Law, orders judgment as follows:

It is Ordered, Adjudged and Decreed that Plaintiff have and recover of the Defendant the sum of \$1032.60, as overtime wages, the [22] further sum of \$1032.60, as and for liquidated damages, the further sum of \$400.00, as

and for attorneys' fees, and his costs of suit, taxed in the sum of \$39.88.

Dated: January 22, 1947.

JACOB WEINBERGER

Judge

Approved as to form:

January 20, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
SAMUEL S. GILL, ROBERT H. SANDERS

By Robert H. Sanders

Attorneys for Defendant.

Judgment entered Jan. 23, 1947. Docketed Jan. 23, 1947, Book 41, Page 439. Edmund L. Smith, Clerk. By L. B. Figg, Deputy. [23]

Received copy of the within Judgment this 20 day of Jan., 1947. Robert H. Sanders, Attorney for Defendant.

[Copy received.]

[Endorsed]: Filed Jan. 23, 1947. [24]

[Title of District Court and Cause]

NOTICE OF APPEAL

Notice Is Hereby Given that California Shipbuilding Corporation, defendant in the action above named appeals to the Circuit Court of Appeals for the Ninth Circuit from a portion of the final judgment entered in this Court on January 23, 1947; said portion of the final judgment being appealed is in the amount of Seven Hundred

18 *Joshua Hendy Corporation, a corporation, vs.*

Thirty-six and 75/100 Dollars (\$736.75) as overtime wages, and Seven Hundred Thirty-six and 75/100 Dollars (\$736.75) as liquidated damages, said sums being awarded for Joseph D. Koury's employment by defendant from January 16, 1944 to July 31, 1944.

Dated: April 16, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES

ROBERT H. SANDERS

Attorneys for Defendant.

[Endorsed]: Filed: Mld. copy to Weinstein & Bertram Apr. 17, 1947. [25]

[Title of District Court and Cause]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 39 inclusive contain full, true and correct copies of Complaint for Wages and Liquidated Damages Due Under the Fair Labor Standards Act of 1938; Answer to Complaint; Stipulation of Facts; Minute Order Entered December 31, 1946; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Contents of Record and Statement of Points; Plaintiff's Designation of Additional Contents of Record on Appeal; Stipulation re Record on Appeal; Stipulation and Order Changing Name of De-

fendant and Amended Statement of Points on Appeal which, together with copy of Reporter's Transcript and Original Plaintiff's Exhibit 7 and Defendant's Exhibits D, F, G and H, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$7.25 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22 day of May, A. D. 1947.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 11636. United States Circuit Court of Appeals for the Ninth Circuit. Joshua Hendy Corporation, a corporation, Appellant, vs. Joseph D. Koury. Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed May 23, 1947.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

20 *Joshua Hendy Corporation, a corporation, vs.*

In the Circuit Court of Appeals of the United States
In and for the Ninth Circuit

No. 11636

JOSHUA HENDY CORPORATION, a corporation,
Appellant,

vs.

JOSEPH D. KOURY,
Appellee.

APPELLANT'S POINTS ON APPEAL AND
DESIGNATION OF RECORD

Appellant in the above-entitled action, in compliance with Rule 19, Subdivision 6, of the Rules of Practice of the above-entitled Court, herewith submits its Points on Appeal and Designation of Record for Appeal.

APPELLANT'S STATEMENT OF POINTS

I.

The Court's Judgment is contrary to and inconsistent with its Findings of Fact relating to Appellee's employment from January 16, 1944 to July 31, 1944, in the following particulars:

A. The Court erred in awarding any amount to Appellee for hours worked by him beyond 48 hours per work-week during said period;

B. The Court lacked jurisdiction to make any award for hours worked by Appellee beyond 48 hours in any work-week during said employment period;

C. The Court erred in awarding liquidated damages in any amount for said employment period.

II.

The Court's Findings of Fact are insufficient in that there are no findings determining whether (a) the activities performed during said employment period for which judgment was rendered were compensable activities by express contract or custom or practice during the various workweeks within which said activities were performed; (b) the Appellant's violation of the Fair Labor Standards Act was in good faith.

* * * * *

Dated: June 2, 1947.

THELEN, MARRIN, JOHNSON & BRIDGES
SAMUEL S. GILL

Attorneys for Appellant

Address:

215 West Sixth Street (1004)
Los Angeles 14, California

Received copy of the within Appellant's Points on Appeal and Designation of Record this 2nd day of June, 1947. Weinstein, Bertram & Vogel, by Perry Bertram. Attorneys for Appellee.

[Endorsed]: Filed Jun. 3, 1947. Paul P. O'Brien, Clerk.

